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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 669

JOHN N. MINNICH, PETITIONER,

vs.

RUSSELL GARDNER ET AL., INTERVENING CREDITORS, AND D. C. REILEY, TRUSTEE OF KING MOTOR CO., BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 18, 1933.

CERTIORARI GRANTED JANUARY 15, 1934.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 26, 1934.

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RECORD

Among the Rolls, records and judicial proceedings had in the District Court of the United States for the Western District of Pennsylvania at No. 15761 In Bankruptcy, may be found the following words and figures:

IN THE
DISTRICT COURT OF THE UNITED STATES
For the Western District of Pennsylvania

In the Matter of
KING MOTOR COMPANY, Bankrupt. } No. 15761 In Bankruptcy.

DOCKET ENTRIES

Aug. 30, 1930 Filing Fee.

Aug. 30, 1930 Creditor's petition filed.

Aug. 30, 1930 Rule granted returnable September 13th, 1930.

Aug. 30, 1930 Subpoena issued.

Sept. 4, 1930 Certified copy of proceedings in Circuit Court of Common Pleas, Bedford County, received and filed.

Sept. 9, 1930 Subpoena with Marshal's return thereon showing service of same filed.

Sept. 19, 1930 Said debtor adjudged bankrupt.

Sept. 19, 1930 Order of reference issued.

Nov. 17, 1930 Bankrupt's schedules filed.

Jan. 26, 1931 Referee having certified to the Court under Rule 8, the public sale of real estate, situate in Bedford, Bedford County, Pa., to Harry E. Cuppett for $52,000.00. Said sale confirmed absolutely.

Mar. 26, 1932 Referee's certificate on Review filed, together with petition for review, testimony, etc.

May 26, 1932 Petition for review, Referee's certificate on Review and schedule of distribution filed.

June 24, 1932 Order made directing the Referee to hold a new meeting for purpose of distribution.

Nov. 10, 1932 Referee's certificate on Review-re: wage claims of Russell Gardner, et al., filed, together with minutes of fifth meeting of creditors and distribution sheet.

Dec. 3, 1932 Order made authorizing Kountz and Fry to withdraw the minutes of testimony for period of seven days.

Dec. 19, 1932 Order made directing that the record on Referee's certificate of Review be returned to Referee so that he may enter an order of distribution. To the foregoing order, John N. Minnich excepts this 19th day of December, 1932, and Bill is sealed.

Jan. 13, 1933 Assignment of Errors filed.

Jan. 13, 1933 On petition order made allowing appeal.

Jan. 18, 1933 Citation issued returnable Feb. 17th, 1933.

Feb. 1, 1933 Citation mailed to Clerk of Circuit Court of Appeals.

Mar. 21, 1933 Exceptions to praecipe for record filed.

Mar. 25, 1933 Praecipe for record on appeal filed.

Mar. 25, 1933 Testimony taken before Referee filed.

Apr. 22, 1933 Order made directing that the time for printing record be extended to May 5th, 1933, nunc pro tunc as of February 17th, 1933.

Apr. 22, 1933 Order made directing that the record to be printed for the appeal shall consist of the following:

1. Docket entries.

2. The paper bearing the Referee's date October 20, 1932, and filed in this Court November 10, 1932, captioned "Distribution of the bankrupt estate by the Referee."

3. The summary of evidence filed the 25th day of March, 1933.

4. The petition for review.

5. Referee's certificate on review filed the 10th day of November, 1932.

6. Order of Court of December 19, 1932, and exception thereto.

7. Petition for appeal and order allowing appeal.

8. Assignments of error.

9. This order.

Apr. 22, 1933 Bond on appeal approved and filed.

DISTRIBUTION OF THE BANKRUPT ESTATE BY REFEREE

(Filed Nov. 10, 1932)

Balance in hands of D. C. Reiley, Esq., Trustee, as per his Account filed		$35,447.24
To D. C. Reiley, Compensation as Trustee on amount coming into his hands, to wit, $38,899.10		
$ 500.00 at 6%	$ 30.00	
1,000.00 at 4%	40.00	
8,500.00 at 2%	170.00	
28,899.10 at 1%	288.99	
Additional compensation of Trustee on amount coming into his hands in conducting the business, to wit, $2396.43, allowed under Section 48		
$ 500.00 at 6%	$ 30.00	
1,000.00 at 4%	40.00	
896.48 at 2%	17.93	
Total compensation as Trustee	$616.92	
The Trustee has taken credit with this amount in his account and received a check for the same.		
To J. Colvin Wright, Esq., and Kountz & Fry, Attorneys for petitioning creditors	$100.00	
To J. Colvin Wright, Esq., money paid out by him as follows:		
Filing Fee paid to Clerk	30.00	
Certification of Common Pleas record	2.00	
Marshall's Fee	24.52	156.54
Leaving		$35,290.70
To Alvin L. Little, Esq., Atty. for bankrupt		150.00
Leaving		$35,140.70

To Mrs. J. Howard Feight, Stenographer		15.00
Leaving		$35,125.70
To Mrs. Dorothy Johnson, Stenographer		90.00
Leaving		$35,035.70

To Eben H. Pennell, Esq., Referee, Fees & Allowances:

Clerical aid in preparing notice of first meeting of creditors	$ 10.00
Office accommodation first meeting of creditors	5.00
30 Claims proven before referee at first meeting of creditors, at 25c each	7.50
Clerical aid, etc., at second meeting of creditors	4.00
72 Notices of second meeting of creditors mailed by referee, 52 in excess of 20 at 20c each	10.40
Office accommodation at second meeting of creditors	5.00
Clerical aid, etc., at third meeting of creditors	4.00
Gazette Publishing Co., use of Referee printing notices for third meeting of creditors	2.75
75 Notices of third meeting of creditors mailed by referee, 55 in excess of 20 at 20c each	11.00
Office accommodation at third meeting of creditors	5.00
Clerical aid at fourth meeting of creditors	4.00
Gazette Publishing Co., use of Referee printing notices of fourth meeting of creditors	2.75

76 Notices of fourth meeting of creditors mailed by the referee, 56 in excess of 20 at 20c each	11.20	
Office accommodation at fourth meeting of creditors	5.00	
Telephone message to clerk's office from Bedford to Pittsburgh	.90	
Clerical aid at fifth meeting of creditors	4.00	
Inquirer Printing Co., use of Referee printing notices for fifth meeting of creditors	1.75	
Western Union Telegraph Co., telegrams to Harrisburg use of referee	.47	
76 Notices of fifth meeting of creditors mailed by the referee, 56 in excess of 20 at 20c each	11.20	
Office accommodation at fifth meeting of creditors	5.00	
Clerical aid in preparation of Report and Opinion	3.00	
Clerical aid on notice of application for discharge	10.00	
Referee's Commission 1% on $34,911.78	349.11	473.03
Leaving		$34,562.67

The referee finds that the total charges coming into the hands of the trustee amount to $38,899.10. This is made up of two funds; the personal property fund amounting to $6,899.10, and the real estate fund amounting to $32,000.00. A part of the personal property fund came into the hands of the trustee from the conduct of the business from the time the King Motor Company was adjudicated a bankrupt until the real estate was sold and the purchaser took possession. From the personal prop-

erty fund must be deducted the costs of conducting the business, consisting of storing cars and selling gas and oil in the large garage of the bankrupt. The expenses of conducting the business amounting to $2,383.79, must be paid out of the personal property fund. These are proper credits in the account of the trustee and are allowed.

The referee finds as a fact that the expenses of the bankruptcy proceeding such as the compensation of the trustee amounting to $616.92, the amount to be paid to J. Colvin Wright, Esq., and Kountz and Fay, Attorneys for petitioning creditors, together with the filing fees and costs paid by them amounting to $156.54, the fee to be paid to Alvin L. Little, Esq., Attorney for the bankrupt of $150.00, the amount paid to stenographers amounting to $105.00, the compensation of the referee $473.03, the appraisers fees amounting to $180.00, other bills amounting to $31.80, the bills for printing the notice of the first meeting of creditors $9.95, the bills for calling and clerking the sale of personal property amounting to $95.00 and for advertising the sale of personal property amounting to $9.50, totaling $1817.74, are the total costs of the bankruptcy proceeding.

The real estate at the time of the adjudication in bankruptcy was encumbered with numerous judgment liens thereon, must be paid to the lien creditors, undiminished by anything except the costs of sale.

The referee finds the personal property fund to be sufficient to pay the expenses and costs of the bankruptcy proceeding.

The referee finds that the real estate fund of $32,000.00 after paying certain tax liens thereon will not be sufficient to pay the judgment lien creditors in full.

The referee having made a former distribution in this estate to which a petition for review had been filed on the part of certain labor claimants and the former distribution having been lost, it is agreed that in the new distribution to be made by the referee certain taxes shall be paid entirely out of the real estate fund and $650.00 of

expenses heretofore charged to the personal property funds shall not be charged to the real estate fund. Leaving $1817.47 less $650.00 or $1167.47 of expenses to be paid by the personal property fund.

A copy of this agreement of settlement the referee is asked to insert in this distribution, it being as follows:

"J. Colvin Wright, Esq., representing labor claimants, in re- King Motor Company Bankruptcy, having filed exceptions to the appropriation by the Referee of the amount due the Commonwealth of Pennsylvania for capital stock and corporate loan taxes, and also to the allowance of all the expenses of the sale of the real estate of the bankrupt corporation out of the personal property fund, and for the purpose of securing an early adjustment of the matters in dispute and immediate distribution of the real estate fund, it is agreed between J. Colvin Wright, Esq., representing the labor claimants, and Hon. B. F. Madore, representing all the judgment lien creditors except John N. Minnich, Esq., that the exceptions heretofore filed to the items above mentioned shall be withdrawn and that the referee, in addition to the deduction for the expenses for the sale of real estate, amounting to $109.90, taxes due Bedford County amounting to $580.00, taxes due Bedford School District amounting to $974.40, and taxes due Bedford Borough amounting to $487.20, shall deduct from the said real estate fund all the capital stock and loan taxes due the Commonwealth amounting to $1929.60 and $650.00 as expenses of the sale of the real estate.

In consideration of the allowancce out of the real estate fund of all the capital stock and loan taxes due the Commonwealth, and of the additional $650.00 as expenses of the sale of the real estate, J. Colvin Wright, Esq., representing all of the labor claimants, as aforesaid, hereby waives for his said clients all rights of action which said labor claimants now have, or could have, for the recovery of any sum from First National Bank & Trust Company of Bedford, Pa., arising from the delivery of certain automobiles to said First National Bank & Trust Company

within four months of the adjudication of the King Motor Company as bankrupt.

J. COLVIN WRIGHT
Attorney for labor claimants.
B. F. MADORE,
Attorney for First National Bank & Trust Co., et al lien creditors."

September 2, 1932.

The referee finds as a fact that the bill for calling the sale of real estate of $10.00, the bills for advertising the sale of real estate $98.65 and for certified copy of order for the sale of real estate amounting to $1.25, together amounting to $109.90, must be paid entirely out of the real estate fund.

Total personal property fund	$6,899.10
Deduct costs of conducting the business	2,383.79
Leaving	$4,515.31
Deduct costs to be paid out of personal property funds	1,167.47
Leaving	$3,347.84

Seventeen labor claims have been filed with the referee upon which a preference is claimed for labor performed within three months prior to the filing of the petition in bankruptcy not to exceed $600.00 to each claimant under Section 64 B 5 of the Bankruptcy Act. These labor claims upon which a preference is claimed amount in the aggregate to $3,987.74.

There are certain tax claims against the bankrupt which are made liens on the personal property fund by statute and which must be first paid before the labor claims can be paid out of this fund.

The Department of Revenue of the Commonwealth of Pennsylvania, through the Bureau of Liquid Fuels, has filed with the referee, April 3, 1931, a claim for tax on liquid fuels covering the period from July 1929 to August 1930 with the penalties attached, amounting to

$3,053.74. This claim was not filed until after the trustee in bankruptcy had sold both the real estate and personal property of the bankrupt.

Section 12 of the Act of May 1, 1929, P. L. 1042 provides as follows: "All taxes collected by a dealer on consumer for the Commonwealth shall be considered a public account after being determined in the manner herein prescribed and as such, shall be a lien upon the franchises or property, both real and personal, of any dealer or consumer, after the same has been entered and indexed of record by the prothonotary of the county where the dealer's or consumer's franchises are situated." No entry of this claim or any part thereof was made by the prothonotary of the Court of Common Pleas of Bedford County, Pa., and this claim never was a lien on either the real estate or personal property of the bankrupt and is allowed by the referee as a common claim.

There has been filed with the referee by the Collector of Internal Revenue at Philadelphia, Pa., a claim for income taxes due the United States of America amounting to $912.16. This is made up of several items as follows:

Nature of Tax and Statute Involved. Give Section or Sections. Withholding and Income Taxes, Revenue Act 1926-1927-1928; together with interest at 1% per month until paid.

Year of Taxable Period ending	Amount of Tax	Interest Began
1922 W. T.	$ 38.63	3-10-30
1926 W. T.	59.86	
1927 W. T.	55.16	
1928 W. T.	52.02	
1929 W. T.	39.20	6-15-30
1929 I. T.	667.29	9-15-30

Attached to this claim is the following; "That this claim is entitled to be paid before all other claims, the priority of the United States for the payment of taxes

being fully determined by Sections 3466 of the Revised Statutes and Section 64 (a) of the Bankruptcy Act."

And attention is hereby called to Section 3467 of the Revised Statutes which provides: "That every executor, administrator, or assignee, or other person who pays any debt due by the person or estate for whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due and unpaid."

The claim for this tax was filed with the referee December 4, 1930, shortly before the sale of the personal property and real estate by the trustee.

Certain judgments became liens on the real estate of the bankrupt January 31, 1927, they being entered in the Court of Common Pleas of Bedford County, Penna., January 31, 1927.

The real estate fund is not sufficient to pay these liens in full.

Section 3186 of the revised statutes reads as follows:

"If a person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States, from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest penalties and costs that may accrue in addition thereto upon all property and rights to property, belonging to such person; provided, however, that such lien shall not be valid as against any mortgage, purchaser or judgment creditor, until notice of such lien shall be filed by the collector in the office of the clerk of the district court of the district within which the property subject to such lien is situated. Provided further: whenever any state by appropriate legislation authorizes the filing of such notice in the office of the register or recorder of deeds of the counties of that state, or in the State of Louisiana in the parishes thereof, then such lien shall not be valid in that state as against

any mortgagee, purchaser or judgment creditors, until such notice shall be filed in the office of the register or recorder of deeds of the county or counties or parish or parishes in the state of Louisiana, within which the property subject to the lien is situated."

The referee finds that this claim for Federal Income taxes is entitled to participate only as a general claim, and it is allowed as such; but it is not a lien and cannot affect the judgment liens prior thereto.

"The claim of the government extends only to that which was the property of the debtor when he became insolvent and his property is only that, in substance, which remains after the satisfaction of liens upon it."

"It has been uniformly held in all the cases that the priority of the United States does not disturb any specific liens not the perfected lien of a judgment, that is, it does not supersede a mortgage on land nor a judgment made perfect by the issuance of an execution and levy on land."

In the matter of The Coswell Construction Company, Bankrupt, S.A. B. R. (N. S.) 31, See page 31.

On March 21st, 1929, John N. Minnich, a creditor, entered a judgment against King Motor Company to No. 190 April Term, 1929, in the Court of Common Pleas of Bedford County, and on the same day another judgment was entered by John N. Minnich against King Motor Company to No. 191 April Term, 1929, in the Court of Common Pleas of Bedford County; executions were issued on both judgments on March 26th, 1929, and on the same day a levy was taken of the personal property of the King Motor Company and endorsed on the writs by J. M. Fink, Sheriff of Bedford County, Pennsylvania. These executions have been continued from time to time, and on August 2[illegible], 1930, clauses of Fieri Facias were added to the vendices and the sheriff directed to proceed to sell all the goods on hand and the same were advertised for sale. The said John N. Minnich claims a lien on the goods levied upon on March 26, 1929, by virtue of his executions.

From the offers made and the testimony taken, the Referee finds the following facts:

1. That on March 21, 1929, John N. Minnich entered a judgment in the Court of Common Pleas of Bedford County, Penna., to No. 190 of April Term, 1929, against the King Motor Company for Six Thousand Seven Hundred Eighty-eight Dollars and Sixty Cents. Costs use of Attorney Minnich, $1.75.

2. That on the above judgment a Fieri Facias was issued out of the Court of Common Pleas of Bedford County, Penna., to No. 62 of April Term, 1929, and on the same day the sheriff levied upon all the personal property of the King Motor Company and endorsed the same on the writ. To this Fi. Fa. the sheriff returned "goods on hand not sold."

3. That a Venditioni Exponas was issued upon the above Fieri Facias to No. 12 of September 12, 1929, to which Ven. Ex. the Sheriff returned "goods on hand not sold, writ not executed for want of time."

4. That an Alias Venditioni Exponas was issued to No. 12 of November Term, 1929, directing the sheriff to sell the goods, to which Al. Ven. Ex. the sheriff returned "goods on hand not sold."

5. That a Pluries Venditioni Exponas was issued to No. 13 of January Term 1930 to which the sheriff returned "goods on hand not sold, writ not executed for want of time."

6. That a second Pluries Venditioni Exponas was issued to No. 17 of April Term 1930, to which the sheriff returned "goods on hand not sold, writ not executed for want of time."

7. A third Pluries Venditioni Exponas was issued to No. 22 of September Term, 1930.

8. That on August 23, 1930, a clause of Fieri Facias was attached to the third Pluries Venditioni Exponas No. 22 of September Term, 1930, and on the same day an ad-

ditional levy was taken by the sheriff of Bedford County upon the personal property of the King Motor Company acquired since the original levy and the same was endorsed upon the writ.

9. That on August 21, 1930, the said John N. Minnich, directed the sheriff in writing that he must advertise all the goods taken under the original levy of March 26, 1929, and those taken under the attached clause of Fi. Fa. on August 21, 1930, and that the said sheriff must close up the place and sell the goods immediately.

10. That the sheriff of Bedford County on August 21, 1930, under and by virtue of the Venditioni Exponas issued to No. 22 of September Term, 1930, and the clause of Fi. Fa. thereto attached, advertised for sale to be held on August 29th, 1930, all the personal property of the King Motor Company.

11. That on August 25, 1930, to No. 2 of September Term of 1930 in the Court of Common Pleas of Bedford County, Pennsylvania, sitting in equity, a receiver was appointed for the King Motor Company, and it was ordered that the above execution be stayed until the final determination of the matter.

12. That on March 21, 1929, John N. Minnich entered a judgment in the Court of Common Pleas of Bedford County, Pennsylvania, to No. 191 of April Term, 1929, against the King Motor Company in the amount of eight hundred dollars. Costs use of Attorney Minnich, $1.75.

13. That on the above judgment a Fieri Facias was issued out of the Court of Common Pleas of Bedford County, Pennsylvania, to No. 63 of April Term, 1929, and on the same day the sheriff levied upon all the personal property of the King Motor Company and endorsed the same on the writ. To this Fi. Fa. the sheriff returned "Goods on hand not sold."

14. That a Venditioni Exponas was issued to No. 13 of September Term, 1929, to which the sheriff returned

"goods on hand not sold, writ not executed for want of time."

15. That an Alias Venditioni Exponas was issued to No. 9 of November Term, 1929, to which the sheriff returned "goods on hand not sold."

16. That a Pluries Venditioni Exponas was issued to No. 12 of January Term 1930, to which the sheriff returned "goods on hand not sold, writ not executed for want of time."

17. That a second Pluries Venditioni Exponas was issued to No. 17 of April Term, 1930, to which the sheriff returned "goods on hand not sold, writ not executed for want of time."

18. That a third Pluries Venditioni Exponas was issued to No. 23 of September Term, 1930.

19. That on August 21, 1930, a clause of Fieri Facias attached to the third Pluries Venditioni No. 23 of September Term, 1930, and all the personal property of the King Motor Company not levied upon under the original execution was levied upon by the sheriff on August 21, 1930, and the levy endorsed on the writ.

20. That the said John N. Minnich on August 21, 1930, directed the sheriff in writing that he must shut up the place of business of the King Motor Company and advertise and sell the goods which had been levied upon.

21. That on August 21, 1930, by virtue of the original levy and the additional levy taken under the attached clause of Fi. Fa. the Sheriff advertised the personal property of the King Motor Company for sale on August 29, 1930.

22. That on August 25, 1930, a receiver in equity was appointed for the King Motor Company by the Court of Common Pleas of Bedford County, Pennsylvania, and it was ordered by said Court that all executions should be stayed until the final determination of the matter.

23. That John N. Minnich notified D. C. Reiley, Esq., who had been appointed Receiver, that he had a

lien by virtue of his executions upon the personal property of the King Motor Company.

24. That on September 19, 1930, the King Motor Company was declared an involuntary bankrupt and on October 21, 1930, D. C. Reiley, Esq., was elected Trustee of the bankrupt estate.

25. That immediately after the election of the Trustee, John N. Minnich gave notice in writing to D. C. Reiley, Esq., the Trustee, that he had a lien upon the personal property of the King Motor Company which had been levied upon on March 26, 1929, and notified the said Trustee not to interfere with said personal property and asked that the same should be separate and apart from any other goods, and if the Trustee did take charge of this personal property that he should sell it separate and apart from any other personal property.

26. That the matter was taken up before the meeting of the creditors and on December 2, 1930, at an adjourned first meeting, the inventory of all the personal property of the King Motor Company was gone over in detail, and the items which were on hand on September 19, 1930, the date of the adjudication, and which had been levied upon on March 26, 1929, were marked and separated from the articles appearing on the inventory upon which a levy had not been taken on March 26, 1929.

27. That the Trustee did not sell the personal property upon which the levy had been taken on March 26, 1929, separate and apart from the other goods of the bankrupt and filed his account showing the sale of the personal property as a whole.

28. On April 14, 1931, at the third meeting of the creditors, the accounts of D. C. Reiley, Esq., Trustee, was presented for approval, and John N. Minnich filed exceptions on the ground that the Trustee had failed to keep separate and apart the amount received from the items of personal property upon which a levy had been taken on March 26, 1929.

29. That the sale list was examined and compared with the inventory which had been marked and it was decided that the goods which had been levied upon on March 26, 1929, and had been sold by the Trustee, represented fifty per cent of the selling price of all the personal property. The personal property sold for Three Thousand Five Hundred Fifty Two Dollars and Thirty Five Cents, and that One Thousand Seven Seventy Six Dollars and Seventeen Cents should be the value of the personal property levied upon by the sheriff on March 26, 1929.

30. That the levies taken by the sheriff of Bedford County, Pennsylvania, on the personal property of the King Motor Company by virtue of Fieri Facias No. 62 and 63 of April Term, 1929, were kept alive by the proper issuing of Vendices.

31. That any delay by John N. Minnich was in good faith and in furtherance of a genuine intention to collect his debt.

32. That the said John N. Minnich did not in fact hinder any creditors or later executions.

33. That the executions of John N. Minnich are a valid lien, more than four months old, upon the personal property of the King Motor Company levied upon on March 26, 1929.

34. That the sum of $1776.17 must be applied to executions Nos. 62 and 63 of April Term 1929 diminished only by the amount of costs which would have been necessary if sold by the sheriff of Bedford County.

35. That the costs if sold by the sheriff would have been $2.00 holding sale and clerk, and $16.38 poundage. Total $18.38.

36. That the amount to be applied executions No. 62 and 63 of April Term, 1929, is $1757.79 and will pay 88.9 per cent upon execution No. 62 or $1562.68 and 11.1 per cent upon Execution No. 63 or $195.11.

37. That John N. Minnich released any claim to the after acquired personal property levied upon on August 21, 1930, by virtue of the clause of Fieri Facias added to the Veindices.

The execution and levy in the Court of Common Pleas of Bedford County, Pennsylvania, by the Creditor more than four months before the bankruptcy gave a lien upon the bankrupt's property to the extent of the judgment interest and costs.

This lien being obtained more than four months prior to the filing of the petition, is not only not to be deemed null and void, but its validity is recognized. The Trustee was vested by operation of law with the title of the bankrupt subject to this lien.

The wage claimants have objected to this lien for the reason that the execution had been issued eighteen months prior to bankruptcy.

The validity of a lien is determined by the law of the State where it is created and under the laws of the State of Pennsylvania the lien was not void.

The law is laid down in Platt-Barber and Co., vs. Groves 193 Pa. 475 as follows:

"The rule is well established that an execution which is not put in the sheriff's hands bona fide intention of collecting the debt, but merely to be held as a security; or to prevent other creditors from coming upon the debtor's goods, is fraudulent as to them, and will be postponed to subsequent levies. And stay, or unusual delay of the proceedings, allowing the debtor to sell or otherwise to deal with the goods in contravention of the levy, and other acts of similar nature, give rise to a presumption of want of good faith; Dorrance's Admr. vs. Com., 13 Pa. 159; Earl's Appeal, 13 Pa. 483; Freeburger's Appeal, 40 Pa. 244. Such acts, however are not frauds per se, but only evidence of fraud, which may be rebutted, and if the creditor's delay is shown to be in good faith and in furtherance of a genuine intention to collect his debt, he will not be

postponed. Indulgence is not in itself fraudulent, but on the contrary, is sometimes good policy for the creditor as well as mercy to the debtor, especially where as in the present case, the subject of the levy is a store or going business of any kind. There is no fixed time by which such acts are to be judged. The test is good faith and absence of actual hindrance of others. As long as the creditor is honestly seeking collection even by coaxing, and is not, in fact, hindering later execution, so long his indulgence to the debtor will not be a bar to his maintenance of his priority of levy.

"The earlier cases undoubtedly applied the presumption of fraud with great strictness, and exhibit a tendency to treat it as a rule juris et de jure. But it was never divorced intentionally from its true principal, and the later decisions have treated the question more liberally as one of fraud in fact to be determined in each case by the evidence; Broadhead vs. Cornman, 171 Pa. 322; Landis vs. Evans, 113 Pa. 322; Stroudsburg Bank's Appeal, 126 Pa. 523.

"In the present case the evidence shows a clear intent to collect the money, never relinquished or interrupted, and restrained only by an indulgence as to time, as much in the interests of the creditors as of the debtor. The testimony of the deputy sheriff shows that the debtor was negotiating for a loan that would enable him to pay off the debt, and had at least one person willing to advance the money if secured as proposed. The extent of the delay was not fixed by appellant, but by the deputy, who acted partly on his own confidence that the debtor would secure the loan. As the plaintiff's executions amounted to more than $1,200.00, and the store property only producted $700.00 at the sale, it is manifestly good business policy, as well as humanity on the part of the appellant, to indulge efforts of the debtor to secure the money by loan. There was not a trace of any intention to refrain

from exacting payment, or of helping the debtor to hinder other creditors. The presumption arising from the stay of immediate proceedings on the execution was fully met and overcome by the affirmative evidence of good faith."

The evidence shows that the creditor, John N. Minnich, issued his writ with an intention to collect his money and that he never relinquished or interrupted, there was no intention to refrain from exacting payment, or of helping the debtor to hinder other creditors, and the Referee is of the opinion that the creditor acted in good faith. And in this case it was good business policy to indulge when we consider the creditor's executions amounted to almost $9,000.00 and that he realized less than $2,000.00.

As the Supreme Court of Pennsylvania has said, "The test is good faith and an absence of actual hindrance of others." And the Referee is of opinion that John N. Minnich acted in good faith and that he did not hinder any one.

The creditor, John N. Minnich, gave specific directions in writing to the sheriff that he must proceed on August 21, 1930, and the sheriff did proceed and advertise the goods for sale, this was before anything had intervened and before bankruptcy proceedings had been instituted.

This action, if the lien had become dormant, would have revived its priority; and no rights having intervened the lien was not affected by delay.

Total Personal Property Fund	$6,899.10
Deduct expense of conducting the business	2,383.79
Leaving	$4,515.31
Deduct costs to be paid out of personal property	1,167.47
Leaving	$3,347.84

To be applied to the following Executions:

	No. 190 April Term 1929.
	Fi. Fa. No. 62 April Term 1929.
	Vend. Ex. No. 12 Sept. Term 1929.
	Al. Vend. Ex. 12 Nov. Term 1929.
John N. Minnich	Pluries Vend. Ex. No. 14 Jany. Term 1930.
vs.	Second Pluries Vend. Ex. No. 16 April Term 1930.
King Motor Co.	Third Pluries Vend. Ex. No. 22 Sept. Term 1930.
	August 25, 1930, this writ stayed by order of Court.
	Debt, Interest and Costs $8,100.93.

To be applied to this writ out of personal property fund $1,562.68

Leaving $1,785.16

	No. 191 April Term 1929.
	Fi. Fa. No. 63 April Term 1929.
	Vend. Ex. No. 13 Sept. Term 1929.
	Alias Vend. Ex. No. 9 Nov. Term 1929.
John N. Minnich	Pluries Vend. Ex. No. 13 Jany. Term 1930.
vs.	Second Pluries Vend. Ex. No. 17 April Term 1930.
King Motor Co.	Third Pluries Vend. Ex. No. 22 Sept. Term 1930.
	August 25, 1930, this writ stayed by order of Court.
	Debt, Interest and costs $1,010.05.

To be applied to this writ out of personal property fund $195.11

Leaving $1,590.05

The balance of the personal property fund amounting in the aggregate to $1,590.05 must be applied to seventeen labor claims which are preferred under Section 64 B 3 of the Bankruptcy Act. These claims amount in the aggregate to $3,987.74 and will receive a dividend of .3987 cents on each $1.00 claim, or 39.87%.

To J. Colvin Wright, Esq., Attorney for Labor Claimants, as follows:

Amount carried forward		$1,590.05
Russell Gardner,	Claim	Pro Rata
Bedford, Pa.	$522.00	$208.12
Albert Barkman,		
Clearville, Pa., R. F. D.	390.40	155.65
Frank James,		
Rainsburg, Pa.	460.75	183.70
Clarence H Smith,		
Mann's Choice, Pa.	330.00	131.58
Grant Grimes,		
Bedford, Pa.	329.72	131.47
Randolph Burket,		
Bedford, Pa.	197.66	78.82
James Perdew,		
Bedford, Pa.	178.02	70.99
Alton Drenning,		
Everett, Pa., R. F. D.	165.00	65.78
David Bloom,		
Bedford, Pa.	130.37	51.99
Donald Smith,		
Everett, Pa., R. F. D.	73.24	29.21
W. M. Williams,		
Bedford, Pa., R. F. D. 4	334.43	133.35
Melvin Blankley,		
Bedford, Pa., Star Rt.	39.16	15.62
Henry F. Kagarise,		
New Enterprise, Pa.	207.00	82.54
R. L. Housel,		
Bedford, Pa.	261.81	104.39
J. King Henry,		
Bedford, Pa.	242.74	96.79

John Stiver, Bedford, Pa.	72.10	28.76
Esther Kauffman, Bedford, Pa.	53.34	21.28
		$1,590.05

On October 8, 1930, the Department of Revenue of the Commonwealth of Pennsylvania filed with the Referee preferred claims for taxes amounting in the aggregate to $5037.48, made up of eighteen separate items all proved as one preferred tax claim.

The Board of Finance and Revenue of Commonwealth of Pennsylvania has made a tentative resettlement of these taxes in the sum of $1929.60 and has notified the referee of this by letter from the Department of Revenue of the Commonwealth to Eben H. Pennell, Referee, dated July 18, 1932.

The above amount of $1929.60 due to the Commonwealth of Pennsylvania has already been paid to the Commonwealth of Pennsylvania by the Trustee and is to be charged to the balance of the real estate fund.

The attention of the Court is respectfully directed to the Act of April 9, 1929, Section 1401 P.L.429 as follows: "All state taxes imposed under the authority of any law of this Commonwealth, now existing or that may hereafter be enacted, and unpaid bonus, interest, penalties, and all public accounts settled against any corporation, association or person, shall be a first lien upon the franchises and property, from the date of settlement, and whenever the franchises or property of a corporation association, or person shall be sold at a judicial sale, all taxes, interest, bonus and penalties and public accounts due the Commonwealth, shall first be allowed and paid out of the proceeds of such sale before any judgment, mortgage or other claim or lien against such corporation, association or person."

Total Real Estate Fund		$32,000.00
Deduct expenses to be paid out of real estate fund		109.90
Leaving		$31,890.10
Deduct costs to be paid out of real estate fund as per agreement of settlement		650.00
Leaving		$31,240.10
The following tax claims must be paid out of the real estate fund:		
1. State and County taxes for year 1930	$580.09	
2. Harry E. Cuppett, Col. School tax for Bedford Borough for year 1930	974.40	
3. Harry E. Cuppett, Col. Borough tax for Bedford Borough for year 1930	487.20	2,041.60
Leaving		$29,198.50
Amount of taxes due the Commonwealth of Pennsylvania to be paid out of real estate fund		1,929.60
Leaving		$27,268.90

In accordance with the facts as found, the Referee makes the following

DISTRIBUTION

The balance of the real estate fund, amounting to $27,268.90, must be applied to and prorated among certain judgment liens entered January 31, 1927, in the Court of Common Pleas of Bedford County, Pa., to Nos. 40 to 51 inclusive, of April Term, 1927, which became liens against the real estate of King Motor Company January 31, 1927. These liens with debt, interest and costs thereon amount to $40,378.78, the fund to be applied to them amounts to $27,268.90 and each $1.00 of the amount of the lien will receive .6753 cents.

The Referee declares a dividend of 67.53⅓ payable to the lien creditors on each $1.00 of amount of lien.

	No. 40 April Term, 1927	
Harry E. Cuppett	Debt	$8,300.00
	Interest	128.65
vs	Costs use of Plaintiff	4.85
King Motor Co.	Total	$8,433.50
	Applied to Lien	$5,695.34
	No. 41 April Term 1927	
Same	Debt	$4,000.00
	Interest	62.00
vs	Costs use of Plaintiff	4.85
Same	Total	$4,066.85
	Applied to Lien	$2,746.44
	No. 42 April Term, 1927	
John P. Cuppett	Debt	$2,500.00
	Interest	32.50
vs	Costs use of Plaintiff	1.65
King Motor Co.	Total	$2,534.15
	Applied to Lien	$1,711.39
	No. 43 April Term, 1927	
Same	Debt	$2,500.00
	Interest	32.50
vs	Costs use of Plaintiff	1.65
Same	Total	$2,534.15
	Applied to Lien	$1,711.39
	No. 44 April Term, 1927	
Same	Debt	$1,000.00
	Interest	13.00
vs	Costs use of Plaintiff	1.65
Same	Total	$1,014.65
	Applied to Lien	$ 685.22

	No. 45 April Term, 1927	
M. Florence Cuppett	Debt	$2,000.00
	Interest	26.00
vs	Costs use of Plaintiff	1.65
	Total	$2,027.65
King Motor Co.	Applied to Lien	$1,369.32

	No. 46 April Term, 1927	
First National Bank of Bedford, Pa.	Debt	$1,000.00
	Interest	220.00
vs	Costs use of Plaintiff	1.65
	Total	$1,221.65
King Motor Co.	Applied to Lien	$ 825.02

	No. 47 April Term, 1927	
Same	Debt	$1,000.00
	Interest	216.00
vs	Costs use of Plaintiff	1.65
	Total	$1,217.65
Same	Applied to Lien	$ 822.32

	No. 48 April Term, 1927	
Same	Debt	$1,000.00
	Interest	218.50
vs	Costs use of Plaintiff	1.65
	Total	$1,220.15
Same	Applied to Lien	$ 824.00

	No. 49 April Term, 1927	
Same	Debt	$4,320.55
	Interest	902.99
vs	Costs use of Plaintiff	1.65
	Total	$5,225.19
Same	Applied to Lien	$3,528.77

	No. 50 April Term, 1927	
Same	Debt	$1,989.00
	Interest	432.55
vs	Costs use of Plaintiff	1.65
Same	Total	$2,423.20
	Applied to Lien	$1,636.49

	No. 51 April Term, 1927	
C. A. Diehl,	Debt	$6,961.60
Treasurer,	Interest	1,496.74
	Costs use of Plaintiff	1.65
vs		
King Motor Co.	Total	$8,459.99
	Applied to Lien	$5,713.20

Respectfully submitted,
(Sgd.) EBEN H. PENNELL,
Referee in Bankruptcy.

Bedford, Penna., October 20, 1932.

SUMMARY OF EVIDENCE
(Filed March 25, 1933.)

TESTIMONY OF WITNESSES:

W. A. King called by the wage claimants testified as follows:

I was President and Manager of the King Motor Company for a period of years prior to 1930. The King Motor Company was organized in 1920, one of the assets of the Company was a large garage building in the Borough of Bedford, about January 21, 1927, certain judgments were entered against the real estate, and the Corporation had a large indebtedness at that time.

At the time of the entering of these judgments I talked to various creditors individually to know what was going to happen, but there was positively no agreement made between myself and any individual creditor as to any delay.

In the latter part of March, 1929, John N. Minnich issued two executions against the King Motor Company which caused considerable stir among the other creditors, and it was attempted to hold a meeting of the creditors on Easter Monday of 1929 to discuss the financial condition of the Company. John N. Minnich was there with other creditors, the meeting only lasted three minutes as one of the creditors walked out and the meeting was adjourned. At this time the King Motor Company was involved, I think it was publicly known.

At a latter time I had a conversation with Mr. Minnich about his executions, it was my argument that we were entering a good year in a business way and if given a chance we could possibly work out but there was no agreement with the creditors, and there was no financial break up at that time.

We continued the business of the Corporation entirely the same as if there were no execution liens on the personal property, and sold personal property in due course of business from time to time, and it was fully known to the public and to the creditors. The Sheriff issued a levy but did not take physical possession of the assets and we did not notify the sheriff when we were going to sell an automobile or anything but simply sold them in the due course of business aside from the levy. After the first five months in 1930 the business of the King Motor Company got worse to such an extent that as President and Manager of the Corporation I filed a petition in the Court of Common Pleas of Bedford County on the 25th day of August, 1930, in which I swore the Corporation was insolvent at that time.

The Corporation was insolvent for a period of thirty or forty-five days preceding August 25th, 1930.

On cross examination Mr. King testified:

There was no meeting of any character of the creditors until after the executions of John N. Minnich were issued and there was no agreement of the creditors at any time in relation to our continuance of business and there

never was any agreement between myself as an officer of the King Motor Company or myself as an individual and John N. Minnich that Mr. Minnich refrain from pressing his executions; there was no agreement whatsoever in regard to it.

John N. Minnich testified as follows:

I am the plaintiff in Judgments Nos. 190 and 191 of April Term, 1929, and I issued executions upon both judgments. At the time I issued the executions it was my only purpose to collect my money. It was not done for the purpose of a lien. At the time that I issued the writs I gave the Sheriff instructions to make my money. I never interfered with the Sheriff in any way in his conduct with these writs. In 1930 on August 21, I caused a clause of fieri facias to be added to each of the vendices which were outstanding at that time and I gave Sheriff Fink special orders that he levy upon everything of the King Motor Company except what he had levied on before, not to levy upon anything that he had levied upon before; that he was to levy upon the cars and the trucks and take the engine numbers; that there was a brown sedan that was in use, he was to be sure to get it; that he was to levy on the gas and oil; that he was to measure the gasoline in the tanks and note the gallons. I wrote those instructions down for him. This is the original paper which I gave Sheriff Fink (presents paper) at the time and I offer the same in evidence as Exhibit No. 1. I also gave the Sheriff instructions that he was to absolutely shut the place up tight, that no business whatever should be conducted, and that he should advertise and sell the goods immediately, and the Sheriff did take a second levy, or rather an additional levy, and posted his sale bills, although he was instructed to lock the place up, over my objection he left it open, and I even made the objection after he left it open that he was to go back and close it but it still stayed open. After the receiver was appointed I gave Mr. Reiley notice verbally that he should not interfere with those goods upon which I had a levy. After the bankruptcy proceedings were begun and the King Motor Company was de-

clared a bankrupt, and Mr. Reiley was elected Trustee, I gave Mr. Reiley a notice in writing. I have asked Mr. Reiley to produce that notice and he is unable to find the same. That notice which I gave him was that he should not interfere with the goods upon which I had a levy and that if he took charge of them or sold them, he should keep them separate and apart from any other goods, and when he sold them he should sell them separately. I brought the matter before the hearing in bankruptcy and meetings were held, at which time all the goods upon which I had a lien, by virtue of the levy taken in 1929, were definitely marked in the inventory and Mr. Reiley was given notice to sell these separately, and it was so agreed at the meeting of the creditors. Mr. Reiley did not sell those goods separately, and at the meeting of creditors when his sale was up for confirmation, or his account, I do not recall which, the matter was brought up again and an effort was made to go over the sale list and show just what the articles under my levy brought and those which were not under my levy. In going over the same it was discovered that 50% represented as near a fair value as possible, and it was agreed by the creditors that 50% of the sale of the personal property should be considered as the goods which had been sold upon which I claim to have a lien by virtue of my executions issued in 1929. I will further state that I never had any understanding or agreement with King Motor Company or Mr. W. A. King as General Manager individually, or with any other person by which I agreed to hold off or continue my executions. My intention always was that I wanted my money and the only thing that I had in consideration was how best to get it. I never believed the King Motor Company to be insolvent. I was very well acquainted with the books and although they had an indebtedness, I always felt that they had sufficient assets to pay their debts. I had no knowledge of any insolvency and insolvency was never mentioned to me by any one.

I do not feel that the King Motor Company was in an insolvent condition as early as the year 1927, nor in the year 1929 at the time that I issued my executions. I do

know that the King Motor Company owed money, that they had borrowed money, but I did not feel that they were in a condition whereby it would break them up or anything of that kind. I considered them perfectly solvent.

My honest and bona fide intention and the only thing I had in mind was to get my money. I always had that intention and it was the only end toward which I was working.

John N. Minnich on cross examination testified:

I issued Fieri Faciases and then issued a number of Vendices, at the time of issuing the various Vendices I realized the Sheriff had not sold the personal property; I gave him instructions each time that I wanted my money.

I knew the place was open for business and they were doing business, I did not know what they were selling.

I did not know that the Sheriff had not taken physical possession of the property because I knew the Sheriff was down to take possession of it and that he had levied on the items, I did not know that the articles on which I now claim a lien were just left in the possession of the King Motor Company and handled and disposed of in the due course of business, I knew that the Sheriff had levied on them, that he had endorsed a levy on his writ and I believe that he had handled the same as he did in all writs which he executed in his official capacity, I had given him no instructions not to do anything.

I did not issue any execution for the purpose of preventing any other creditor from getting a lien or collecting his money. I also want to state that Mr. Reiley, the Trustee in Bankruptcy, always recognized my liens, he recognized it to such an extent that while he was in operation, if some one came to buy a part which I claimed to have a lien on he would come and ask me if he could sell it before he would sell it.

I did not act to prevent any other creditors from enforcing his rights or getting a lien.

WRITS OFFERED IN EVIDENCE

Fieri Facias No. 62 April Term, 1929, John N. Minnich vs. King Motor Company by W. A. King, President, issued out of the Court of Common Pleas of Bedford County, Pennsylvania, in No. 190 April Term, 1929, levy endorsed thereon and return:

BEDFORD COUNTY, SS:

The Commonwealth of Pennsylvania.

To the Sheriff of Bedford County, Greeting:

(Seal) We command you.....

that of the goods and chattels, lands and tenements of King Motor Company, by W. A. King, President, late of your county yeoman in your bailiwick, you cause to be made and levied the sum of Six Thousand Seven Hundred Eighty Eight and 60-100 dollars which includes $..... Attorney's Commission, lawful money of the United States, which John N. Minnich lately in your county Court of Common Pleas, before our Judges at Bedford, recovered against King Motor Company, by W. A. King, President, for its debt as also one and 75-100 dollars, for its costs which he sustained by occasion of the detention of that debt, whereof the said King Motor Company, by W. A. King, President, is convict as appears of Record. And have that money before our Judges, at Bedford, at our County Court of Common Pleas, there to be held the Third Monday of April next, to render the said John N. Minnich for its debt and costs aforesaid. And have you then and there this writ.

Witness the Honorable Thos. F. Bailey, Esquire, President Judge of our said Court the 27 day of Feb. Anno Domini, one thousand nine hundred and 29.

(Sgd.) H. J. PLEACHER,
Prothonotary.

Received this writ at 1.45 o'clock p. m. March 26, 1929. (Sgd.) J. M. FINK, Sheriff.

March 27, 1929, by virtue of the within writ I have levied on the following personal property, viz:

1 Ford pick up truck, 1 Tudor Sedan, 2 spring racks, 3 Fordor Sedans, 4 Coupes, 3 Desks, 2 sets of shelving, 7 chairs, 2 sets of steel bins, 2 safes, 1 glass rack, 2 typewriters, 1 adding machine, 1 mimeograph machine, 2 coat racks, 2 electric fans, 1 filing case, 2 small filing cabinets, 1 check writing machine, 1 lot of auto parts, 1 lot of accessories, 5 bins of parts, 2 wheels and tire racks, 1 work table, 1 invoice machine, 1 show case, 1 rack for long parts, 3 sections of cabinets for small parts, 1 tool board on rollers, 2 tool cabinets, 1 bolt and lock washer cabinet, 1 set lapping dies, 1 Manly ½ ton crane, 1 Tractor Motor stand, 1 Model A & T Motor stand, 1 Press stand, 1 model A & T Reaming & Rehoning machine, 1 Dixe Rear End stand, 1 kink wag valve machine, 1 Arbor Press, 1 drill machine Superior, 1 lot of Lincoln Tools & Cabinet, 3 Tool Benches Steel, 1 forge, 1 large tool bench, & equipment attached, 1 Generator stand, 1 emery stone stand, 1 Bean water pressure pump, 1 lot of small tools, 1 time clock, 1 desk, 1 coil tester, 3 electric drills, 3 sets chain blocks, 1 set model A Rebabiting Tools & Desk, 1 set Model T Rebabiting Tools, 1 Manley Jack, 2 lift jacks, 1 burning in stand, 1 radiator stand, 1 magnet recharger, 1 lifter car, 1 Manley grease rack, 1 Alemite Equipment complete, 1 air compressor, 1 wooden bench, 1 shop truck, 1 welding outfit, 1 porto stat, 2 Rebabiting torches complete, 1 Tractor Rebabiting outfit, 1 Battery recharger outfit, 1 Cadillac Car with Crane, 1 Brake lining machine, 1 set of Tractor tools, 1 Dodge Roadster, 1 Ford Roadster, 2 old Ford Touring Cars, 1 Ford Coupe, 1 Ford Model A Tudor wrecked, 1 Buick Roadster, 2 Ford Touring Cars, 1 Essex Coach, 1 Moon Touring Car, 1 Ford Fordor Car, 1 Ford Tudor Car.

And all defendant's other personal property, seized and taken in execution as the property of King Motor Company, by W. A. King, President.

April 15, 1929. Sheriff returns goods on hand not sold.

So answers,

(Sgd.) J. M. FINK, Sheriff.

Vend. Ex. No. 12 September Term, 1929, issued to Fi. Fa. No. 62 April Term, 1929, and return:

BEDFORD COUNTY, SS:

The Commonwealth of Pennsylvania.
To the Sheriff of Bedford County, Greeting:
(Seal) We command you, as we before commanded you that of the goods and chattels of King Motor Company, by W. A. King, President, late of your county yeoman in your bailiwick, viz:

1 Ford pick up truck, 1 Tudor Sedan, 2 spring racks, 3 Fordor Sedans, 4 Coupes, 3 desks, 2 sets of shelving, 7 chairs, 2 sets of steel bins, 2 safes, 1 glass rack, 2 typewriters, 1 adding machine, 1 mimeograph machine, 2 coat racks, 2 electric fans, 1 filing case, 2 small filing cabinets, 1 check writing machine, 1 lot of auto parts, 1 lot of accessories, 5 bins of parts, 2 wheels and tire racks, 1 work table, 1 invoice machine, 1 show case, 1 rack for long parts, 3 sections of cabinets for small parts, 1 tool board on rollers, 2 tool cabinets, 1 bolt and lock washer cabinet, 1 set lapping dies, 1 Manly ½ ton crane, 1 Tractor Motor stand, 1 Model A & T Motor stand, 1 Press stand, 1 model A & T Reaming & Rehoning machine, 1 Dixe Rear End stand, 1 kink wag valve machine, 1 Arbor Press, 1 drill machine Superior, 1 lot of Lincoln Tools & Cabinet, 3 tool benches steel, 1 forge, 1 large tool bench, & equipment attached, 1 Generator stand, 1 emery stone stand, 1 Bean water pressure pump, 1 lot of small tools, 1 time clock, 1 desk, 1 coil tester, 3 electric drills, 3 sets chain blocks, 1 set model A Rebabiting Tools & Desk, 1 set Model T Rebabiting Tools, 1 Manley Jack, 2 lift jacks, 1 burning in stand, 1 radiator stand, 1 magnet recharger, 1 lifter car, 1 Manley grease rack, 1 Alemite Equipment complete, 1 air compressor, 1 wooden bench, 1 shop truck, 1 welding outfit, 1 porto stat, 2 Rebabiting torches com-

plete, 1 Tractor Rebabiting outfit, 1 Battery recharger outfit, 1 Cadillac Car with Crane, 1 Brake lining machine, 1 set of Tractor tools, 1 Dodge Roadster, 1 Ford Roadster, 2 old Ford Touring Cars, 1 Ford Coupe, 1 Ford Model A Tudor wrecked, 1 Buick Roadster, 2 Ford Touring Cars, 1 Essex Coach, 1 Moon Touring Car, 1 Ford Fordor Car, 1 Ford Tudor Car.

And all of Defendant's other personal property seized and taken in execution as the property of King Motor Company, by W. A. King, President, which you took, and which remains in your hands unsold for want of buyers, as you returned to our Judges, at our County Court of Common Pleas, on the third Monday of April you expose to sale, and the money thereof amounting to Six Thousand seven hundred eighty eight & 60-100 dollars lawful money of the United States which John N. Minnich lately in our County Court of Common Pleas, before our Judges at Bedford, recovered against King Motor Company, by W. A. King, President, for its debt as also $1.75 for costs which sustained by occasion of the detention of that debt whereof the said King Motor Company, by W. A. King, President, is convict as appears of Record. And have that money before our Judges, at Bedford, at our County Court of Common Pleas, there to be held on the Third Monday of September next, to render the said John N. Minnich for its debt and costs aforesaid. And have you then and there this writ.

Witness the Honorable Thos. F. Bailey, Esquire, President Judge of our said Court at Bedford, the 18th day of April Anno Domini, one thousand nine hundred and 29.

(Sgd.) H. J. PLEACHER,
Prothonotary.

September 16, 1929, goods on hand not sold. Writ not executed for want of time.

So answers,

(Sgd.) J. M. FINK, Sheriff.

Al. Vend. Ex. No. 12 November Term, 1929, issued September 4, 1929, to Vend. Ex. No. 12 September Term, 1929; returned 2nd Monday of November, 1929.

(Writ same as Vend. Ex. No. 12 September Term, 1929, except as to return day and test.)

November 11, 1929, goods on hand not sold.

So answers,

(Sgd.) J. M. FINK, Sheriff.

First Pluries Vend. Ex. No. 14 January Term, 1930, issued November 13th, 1929, to Al. Vend. Ex. No. 12 November Term, 1929; returnable 3rd Monday of January, 1930.

(Writ same as Vend. Ex. No. 12 September Term, 1929, except as to return day and test.)

Goods on hand not sold, writ not executed for want of time.

So answers,

(Sgd.) J. M. FINK, Sheriff.

Second Pluries Vend. Ex. No. 16 April Term, 1930, issued January 22, 1930, to 1st Plu. Vend. Ex. No. 14 January Term, 1930; returnable 3rd Monday of April, 1930.

(Writ same as Vend. Ex. No. 12 September Term, 1929, except return day and test.)

April 21, 1930, goods on hand not sold, writ not executed for want of time.

So answers,

(Sgd.) J. M. FINK, Sheriff.

Third Pluries Vend. Ex. No. 22 September Term, 1930, issued April 30, 1930, to 2nd Plu. Vend. Ex. No. 17 April Term, 1930; returnable 1st Monday of September, 1930.

(Writ same as Vend. Ex. No. 12 September Term, 1929, except return day and test.)

Endorsement on writ:

August 25, 1930, this writ is stayed by order of court.

Fieri Facias No. 63 April Term, 1929, John N. Minnich vs. King Motor Company, by W. A. King, President, issued out of the Court of Common Pleas of Bedford County, Pennsylvania, to No. 191 of April Term, 1929, levy endorsed thereon and return.

(This writ, the receipt, endorsement of levy and return are the same as Fi. Fa. No. 62 April Term, 1929, except as to amount of debt which in this writ is Eight Hundred Dollars.)

Vend. Ex. No. 13 September Term, 1929, issued to Fi. Fa. No. 63 April Term, 1929.

(Writ and return same as Vend. Ex. No. 12 September Term 1929 except as to amount of debt which in this writ is $800.00.)

Al. Vend. Ex. No. 9 November Term, 1929, issued September 4, 1929, to Vend. Ex. No. 13 September Term, 1929.

(Writ and return same as Al. Vend. Ex. No. 12, November Term, 1929, except as to amount.)

First Pluries Vend. Ex. No. 13 January Term, 1930, issued November 13, 1929, to Al. Vend. Ex. No. 9 November Term, 1929.

(Writ and return same as 1st Plu. Vend. Ex. No. 14 January Term, 1930, except as to amount.)

Second Pluries Vend. Ex. No. 17 April Term, 1930, issued January 22, 1930, to 1st Plu. Vend. Ex. No. 13 January Term, 1930.

(Writ and return same as 2nd Plu. Vend. Ex. No. 16 April Term, 1930, except as to amount.)

Third Pluries Vend. Ex. No. 23 September Term, 1930, issued April 30, 1930, to 2nd Plu. Vend. Ex No. 17 April Term, 1930.

(Writ and endorsement same as 3rd Plu. Vend. Ex. No. 22 September Term, 1930, except as to amount.)

SHERIFF'S ADVERTISEMENT OF SALE
(Posted Aug. 21, 1930.)

SHERIFF'S SALE

By virtue of sundry writs of 3rd Plu. Vend. Ex. and Clause of Fi Fa. added to Vend. Ex. issued out of the Court of Common Pleas of Bedford County, and to me directed, there will be exposed to public sale at the Garage of KING MOTOR CO., in Bedford Borough, County of Bedford and State of Pennsylvania on Friday the 29th day of August, 1930, the following property, viz: 1 Ford Pick-up Truck; 1 Tudor Sedan; 2 spring racks; 3 Fordor Sedans; 4 Coupes; 3 desks; 2 set of shelving; 7 chairs; 2 sets steel bins; 2 safes; 1 glass rack; 2 typewriters; 1 adding machine; 1 mimeograph machine; 2 coat racks; 2 electric fans; 1 filing case; 2 small filing cabinets; 1 check writing machine; 1 lot of auto parts; 1 lot of accessories; 5 bins of parts; 2 wheels and tire racks; 1 work table; 1 invoice machine; 1 show case; 1 rack for long parts; 3 sections of cabinets for small parts; 1 tool board on rollers; 2 tool cabinets; 1 bolt and lock washer cabinet; 1 set lapping dies; 1 Manly ½ ton crane; 1 tractor motor stand; 1 model A & T motor stand; 1 press stand; 1 model A & T reaming and rehoning machine; 1 Dixie rear end stand; 1 King Wag valve machine; argor press; 1 drill machine; 1 lot of Lincoln tools & cabinet; 3 steel tool benches; 1 forge; 1 large tool bench & equipment attached; 1 generator stand; 1 emery stone stand; 1 Bean water pressure pump; 1 lot of tools; 1 time clock; 1 desk; 1 coil tester; 3 electric drills; 3 sets chains blocks; 1 set Model A rebabiting tools; desk; stand; 1 radiator stand; 1 magnet recharger; 1 lifter car; 1 Manley grease rack; 1 Alemite equipment complete; 1 air compressor; 1 wooden bench; 1 shop truck; 1 welding out-fit; 1 ponto stat; 2 rebabiting torches; 1 tractor rebabiting out-fit; 1 battery recharger; 1 Cadillac car with crane; 1 brake lining machine; 1 set of tractor tools; 1 Dodge roadster; 2 old Ford Touring cars; 1 Ford Coupe; 1 Ford Model A Tudor wrecked; 1 Buick roadster; 2 Ford Touring cars; 1 Essex Coach; 1 Moon Touring car; 1 Ford Fordor car;

1 Ford Tudor car; 1 chair; 1 air compressor; 10 steel bins; 1 display case; 1 valve grinding machine; 1 Essex Coupe, engine No. 802598; 1 International Truck; 1 Reo Truck; 1 Pontiac Sedan, engine No. 353347; 1 Reo Truck; 1 Star Sedan; 1 Ford Coupe, engine No. 12267522; 1 Buick Touring; 1 Ford Truck; 1 Ford Sedan, engine No. 8119616; 1 Dodge, engine No. A381-68; 1 Ford Touring, engine No. 7688176; 1 Overland Sedan, engine No. 143412; 1 Buick Coupe, engine No. 1434231; 1 Studebaker Sedan; 1 Overland Touring; 1 Buick Touring, engine No. 804912; 1 Ford, engine No. 9723464; 1 Ford Sedan, engine No. A3536034; Gasoline—air craft, 54 gallons; H. E. Gasoline, 54 gallons; Motor Gasoline, 90 gallons; 30 gal. heavy medium oil; 14 gal. heavy oil; 19 gal. extra heavy oil; 12 gal. Arctic oil and all of the defts. other personal property.

SEIZED and taken in execution and to be sold as the property of KING MOTOR COMPANY.

Sale to commence at 9 o'clock a. m. of said day.

(Sgd.) J. M. FINK, Sheriff.

Sheriff's Office, Bedford, Pa.,
August 21, 1930.

ORDER OF COURT STAYING WRITS OFFERED IN EVIDENCE

In the Court of Common Pleas of Bedford County, Pennsylvania, No. 2 September Term, 1930, Sitting in Equity, W. A. King, Plaintiff vs. King Motor Company, Defendant, Bill of Complaint for a receiver.

And now, August 25th, 1930 . . . . . I hereby appoint D. C. Reiley as temporary Receiver of the King Motor Company and it is further ordered that all executions shall be stayed until the final determination of this matter.

Per cur

(Sgd.) THOS. F. BAILEY, P. J.

PETITION FOR REVIEW
(Filed Oct. 31, 1932.)

To the Honorable, Eben H. Pennell,
Referee in Bankruptcy.

The petition of Russell Gardner, Albert Barkman, Frank James, Clarence H. Smith, Grant Grimes, Randolph Burkett, James Perdew, Alton Drenning, David Bloom, Donald Smith, W. M. Williams, Melvin Blankley, Henry F. Kagarise, R. L. Housel, J. King Henry, John Stiver and Esther Kauffman respectfully shows:

That on the 21st day of October 1932 in the aforesaid bankruptcy proceeding, the learned Referee entered an order of distribution, a copy of which order is attached hereunto.

That your petitioners verily believe that the aforesaid order is erroneous, desire a review thereof, and file the following exceptions thereto and the following assignments of error, namely:

1. That the learned Referee erred in that he failed to distribute to your petitioners, and each of them, wage claimants, in full for the amounts owing to your petitioners respectively, not in excess of $600.00 each, your petitioners being entitled to priority of distribution as wage claim claimants under the Bankruptcy Statute.

2. The learned Referee erred in so much of his aforesaid order as directs distribution on the judgment of John N. Minnich at No. 190 April Term 1929, Court of Common Pleas of Bedford County, Pennsylvania, and on the judgment of John N. Minnich at No. 191 April Term 1929, Court of Common Pleas of Bedford County, Pennsylvania, ahead of your petitioners.

3. That the learned Referee erred in so much of said order as holds that the said John N. Minnich had a lien by virtue of any writs issued on either of the two aforesaid judgments.

4. That the learned Referee erred in that he failed to find that the purported execution liens of John N. Minnich, if otherwise valid, were void under Section 67-f of the Act of Congress relating to bankruptcy.

5. The learned Referee erred in his 11th finding of fact on page 9 and in his 22nd finding of fact on page 10 of his distribution that the executions of John N. Minnich were not stayed by the Court "until the final determination of the matter."

6. The Referee erred in his 29th finding of fact for the reason that your petitioners were not parties to any decision, if any was made, that any goods upon which John N. Minnich had a purported execution lien represented fifty per cent of the selling price of all the personal property or $1776.17.

7. The learned Referee erred in his 30th finding of fact on page 11 of the distribution that the levies of John N. Minnich on the personal property of the bankruptcy "were kept alive by the proper issuing of Vendices."

8. The learned Referee erred in his 31st finding of fact on page 11 of his distribution "that any delay by John N. Minnich was in good faith and in furtherance of a genuine intention to collect his debt."

9. The learned Referee erred in his 32nd finding of fact on page 11 of his distribution "that the said John N. Minnich did not in fact hinder any creditors or later executions."

10. The Referee erred in his 33rd finding of fact on page 11 of his distribution "that the executions of John N. Minnich are a valid lien, more than four months old, upon the personal property of the King Motor Company levied upon on March 26, 1929.

11. The learned Referee erred in his 34th finding of fact on page 11 of his distribution that the sum of $1776.17, or any sum, must be applied to the purported execution liens of John N. Minnich.

12. The learned Referee erred in his statement on page 12 of his distribution that "the execution and levy in the Court of Common Pleas of Bedford County, Pennsylvania, by the Creditor more than four months before the bankruptcy gave a lien upon bankrupt's property to the extent of the judgment, interest and costs."

13. The learned Referee erred in his finding on page 12 of his distribution that "this lien being obtained more than four months prior to the filing of the petition, is not only not to be deemed null and void, but its validity is recognized. The Trustee was vested by operation of law with the title of the bankrupt subject to this lien."

14. The learned Referee erred in his statement on page 12 of his distribution that "under the laws of the State of Pennsylvania the lien was not void."

15. The learned Referee erred in his statement on page 13 of his distribution that "the evidence shows that the creditor John N. Minnich issued his writ with an intention to collect his money and that he never relinquished or interrupted, there was no intention to refrain from exacting payment, or of helping the debtor to hinder other creditors and the Referee is of the opinion that the creditor acted in good faith. And in this case it was good business policy to indulge when we consider creditors executions amount to almost $9,000.00 and that he realizes less than $2,000.00."

16. The learned Referee erred in his conclusion and opinion that John N. Minnich acted in good faith, that he did not hinder anyone and that he had a lien.

17. The learned Referee erred in his conclusion as set forth on page 14 of his distribution that the fact that John N. Minnich gave specific directions in writing to the Sheriff on August 31, 1930, revived the priority of his purported lien even though the same had become dormant.

18. The learned Referee erred in holding that John N. Minnich had a lien by virtue of his executions for the

reason, among others, that the said John N. Minnich knew, as shown by the testimony of W. A. King, on July 22, 1932, (page 7 et sec) at the time he issued his executions that the King Motor Company was insolvent and in a very involved financial condition and agreed to attempt to continue and did attempt to continue his execution liens and allowed the corporation to operate its business to give it a chance to work out, the business being continued entirely the same as if no executions had been issued; the Sheriff never having taken possession of the personal property of the corporation and the said personal property being sold from time to time in due course of business, their being no bona fide intention to collect but simply to attempt to continue the liens for approximately eighteen months.

WHEREFORE, your petitioners, desiring a review by the United States District Court for the Western District of Pennsylvania, of the findings, conclusions and order made and entered by the Referee in Bankruptcy on October 21, 1932, file this their petition for review and pray that the aforesaid order, together with the proofs of claim, including all petitions, proofs or affidavits on which the alleged priority items hereinabove complained of were allowed, and the transcript of testimony and offers of counsel taken before said Referee, from which the findings of fact contained in the aforesaid order were made, be certified to the District Court of the United States for the Western District of Pennsylvania for review as provided by law and by the General Orders.

(Sgd.) KOUNTZ AND FRY,
(Sgd.) J. COLVIN WRIGHT,
Attorneys for Russell Gardner, Albert Barkman, Frank James, Clarence H. Smith, Grant Grimes, Randolph Burkett, James Perdew, Alton Drenning, David Bloom, Donald Smith, W. M. Williams, Melvin Blankley, Henry F. Kagarise, R. L. Housel, J. King Henry, John Stiver and Esther Kauffman.

State of Pennsylvania,)
County of Bedford,) ss:

Russell Gardner being duly sworn, deposes and says that he is one of the petitioners herein, and that the statements in the foregoing petition are true, to the best of his knowledge, information and belief.

(Sgd.) RUSSELL GARDNER.

Sworn and subscribed before me
this 31st day of October 1932.

(Sgd.) MARIE EARNEST DIVELY,
(SEAL) Notary Public.
My commission expires March 9, 1935.

REFEREE'S CERTIFICATE ON REVIEW
(Filed Nov. 10, 1932.)

To the Honorable District Judge:

I, Eben H. Pennell, the referee in bankruptcy in charge of this proceeding, do hereby certify:

That in the course of such proceeding, an order, to wit, a schedule of distribution of the bankrupt estate by Eben H. Pennell, Referee, a copy of which is annexed to the petition hereinafter referred to, was made and entered on the twenty first day of October, 1932.

That, on the twenty first day of October, 1932, Russell Gardner, et al., certain labor-claimants, feeling aggrieved thereat, filed a petition for review, which was granted.

That the errors complained of by the petitioners being eighteen in number, are set forth in full in his petition.

That a summary of the evidence on which such order was based is as follows:

That testimony taken before the referee at the Fifth meeting of creditors on July 15, 1932, and at an adjournment of said fifth meeting of creditors on July 22, 1932.

That the questions presented on this review are two in number:

First. "Did the Referee err in his 33rd finding of fact on page 11 of his distribution in holding? "That the executions of John N. Minnich are valid liens, more than four months old, upon the personal property of the King Motor Company levied upon March 26, 1929."

Second. Did the Referee err in his 34th finding of fact on page 11 of his distribution in holding? "That the sum of $1776.17 or any sum, must be applied to the execution liens of John N. Minnich out of the personal property fund before any of the money in the personal property fund was applied to the payment of the preferred labor claims.

I hand up herewith for the information of the Judge, the following papers:

1. The Petition for review on which this certificate is granted.

2. The Distribution of the bankrupt estate by the Referee dated October 21, 1932.

3. The testimony taken before the referee at the fifth meeting of creditors July 15, 1932, and the adjournment thereof July 22, 1932.

Respectfully submitted,

(Sgd.) EBEN H. PENNELL,
Referee in Bankruptcy.

November 4, 1932.

ORDER OF COURT AND EXCEPTION THERETO
(Filed Dec. 19, 1932.)

This cause came to be heard on the Referee's Certificate on Review filed in this proceeding November 10th, 1932, and after arguments of counsel, it is ordered, adjudged and decreed this 19th day of December, 1932, that the two items of John N. Minnich in the respective amounts of $1562.68 and $195.11 shown in the Order of Distribution entered by the Referee in Bankruptcy October 20th, 1932, are not valid liens against the fund, and are not entitled to any distribution ahead of the priority wage claims, and the Referee in Bankruptcy is directed to enter a new order of distribution so eliminating those two said items as liens; and it is ordered that the record be returned to the Referee in Bankruptcy so that he may enter an order of distribution in accordance with the direction herein contained.

(Sgd.) PER CURIAM
S.

To the foregoing Order John N. Minnich excepts this 19th day of December, 1932, and Bill is sealed.

(Sgd.) F. P. SCHOONMAKER (Seal)
United States District Judge.

Presentation of the foregoing Order may be made at any time and I waive notice thereof.

(Sgd.) JOHN N. MINNICH.

ASSIGNMENTS OF ERROR
(Filed Jan. 13. 1933.)

Now, comes John N. Minnich, complainant, and files the following assignment of errors on appeal from order of this court dated December 19th, 1932:

First. That the United States District Court for the Western District of Pennsylvania erred in finding that the two items of John N. Minnich in the respective

amounts of $1562.68 and $195.11 shown in the Order of Distribution entered by the Referee in Bankruptcy October 20th, 1932, are not valid liens against the fund.

Second. That the Court erred in finding that the above items are not entitled to any distribution ahead of the priority wage claims.

Third. That the Court erred in directing the Referee in Bankruptcy to enter a new order of distribution so eliminating those two said items as liens.

Fourth. The Court erred in failing to find that the levies of John N. Minnich under two executions issued out of the Court of Common Pleas of Bedford County, Pennsylvania, were valid liens upon the fund derived from the sale of the property levied upon by virtue of these executions.

Fifth. The Court erred in failing to find that these liens were entitled ahead of wage claimants to the fund derived from the sale of the property levied upon by virtue of the execution of John N. Minnich.

Sixth. The Court erred in failing to find that the Referee having found as a fact on June 8, 1931, that "This lien is valid and must stand," from which finding no review was asked or appeal taken, the matter is res judicata.

Seventh. The Court erred in failing to find that the wage claimants, having entered into an agreement with the First National Bank and Trust Company of Bedford, Pennsylvania, and other real estate lien creditors, whereby in consideration that certain taxes and expenses which had been charged to the general fund should be allowed out of the real estate fund, the wage claimants did waive all rights of action, which they had or could have for the recovery of any sum from the First National Bank and Trust Company of Bedford, Pennsylvania, arising from the delivery of certain automobiles to said Bank within

four months of the adjudication of the King Motor Company as a bankrupt, the said wage claimants are estopped from claiming any other moneys toward their claims.

Wherefore, he prays, that said order will be reversed and his lien allowed.

(Sgd.) JOHN N. MINNICH.

PETITION FOR APPEAL AND ORDER OF COURT
(Filed Jan. 13, 1933.)

John N. Minnich, a claimant, considering himself aggrieved by the order made and entered herein on December 19th, 1932, in the above entitled cause, does hereby appeal from such order and the provisions thereof to the United States Circuit Court of Appeals for the Third Circuit for the reasons specified in the assignment of errors which is filed simultaneously herewith, and he prays that this appeal and review may be allowed, and that a transcript of the record, papers and proceedings upon which such order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit.

(Sgd.) JOHN N. MINNICH,
January 7th, 1933. Petitioner.
118 South Juliana Street,
Bedford, Pa.

The foregoing appeal is hereby allowed.

(Sgd.) F. P. SCHOONMAKER,
January 13, 1933. U. S. D. J.
(Sgd.) Per Gibson.

ORDER OF COURT FOR RECORD ON APPEAL
(Filed April 22, 1933.)

And now, April 22nd, 1933, after hearing on the exceptions filed to the praecipe for record, it is ordered that the record, to be printed for the appeal, shall consist of the following:

1. Docket entries.

2. The paper bearing the Referee's date October 20, 1932, and filed in this Court November 10, 1932, captioned "Distribution of the bankrupt estate by the Referee."

3. The summary of evidence filed the 25th day of March, 1933.

4. The petition for review.

5. Referee's certificate on review filed the 10th day of November, 1932.

6. Order of Court of December 19, 1932, and exception thereto.

7. Petition for appeal and order allowing appeal.

8. Assignments of error.

9. This order.

(Sgd.) PER CURIAM.

S.

By consent:

(Sgd.) W. E. KOUNTZ, Atty. for Appellees.

(Sgd.) JOHN N. MINNICH, Appellant.

CERTIFICATE

WESTERN DISTRICT OF PENNSYLVANIA, SS:

I, J. Wood Clark, Clerk of the District Court of the United States for the Western District of Pennsylvania do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record sur Appeal in the above entitled case, so full and entire as the same remains of record and on file in my office, in the City of Pittsburgh, in said District.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of the said Court, at Pittsburgh this day of , A. D. 1933.

(SEAL) J. WOOD CLARK,
Clerk

Minute entry of argument and submission, May 31, 1933, omitted in printing.

In United States Circuit Court of Appeals for the Third Circuit, March Term, 1933

No. 5088

John N. Minnich, Appellant,

v.

Russell Gardner et al., Intervening Creditors, and D. C. Reiley, Esq., Trustee of King Motor Co., Bankrupt, Appellees

Upon Appeal from the District Court of the United States for the Western District of Pennsylvania

Opinion Filed July 12, 1933

Before Woolley, Davis, and Thompson, Circuit Judges.

Thompson, Circuit Judge:

This is an appeal from a final order and decree of the District Court for the Western District of Pennsylvania sitting in bankruptcy. On March 21, 1929, the appellant entered a judgment against the King Motor Company in the Court of Common Pleas of Bedford County. On March 26, 1929, he caused execution to be issued upon the judgment. On March 27, 1929, the sheriff levied upon the personal property of the King Motor Company and endorsed his levy upon the writ. On April 15, 1929, the sheriff returned "goods on hand not sold". On April 18, 1929, the appellant caused a writ of vend. ex. to be issued; on September 4, 1929, an alias writ of vend. ex.; and on November 14, 1929, January 22, 1930, and April 30, 1930, pluries writs of vend. ex. Each of these writs was returned by the sheriff, either with the endorsement "goods on hand not sold, writ not executed for want of time", or "goods on hand not sold". On August 21, 1930, the appellant instructed the sheriff to advertise the goods of the King Motor Company for sale and to sell the same immediately.

On August 25, 1930, a receiver in equity was appointed for the King Motor Company by the Court of Common Pleas of Bedford County. The sheriff advertised on August 21, 1930. On August 30, 1930, an involuntary petition in bankruptcy was filed against the King Motor Company which was adjudged a bankrupt on September 19, 1930, and a trustee in bankruptcy appointed. Written notice was given to the trustee that the appellant had a lien upon the personal property of the King Motor Company because of the levy of March 27, 1929. All of the personal property of the company was sold. It was agreed by the trustee and the appellant that fifty per cent of the proceeds of the sale represented the value of the property which had been levied upon by the appellant. The referee awarded this sum to the appellant as a lienor. Upon the referee's certificate for review, the District Court decreed that the writs of execution did not entitle the appellant to valid liens against the fund nor to any distribution in preference to the priority wage claims. No opinion was filed by the District Court.

In Platt-Barber Co. v. Groves, 193 Pa. 475, the court said:

"The rule is well established that an execution which is not put in the sheriff's hands with the bona fide intention of collecting the debt, but merely to be held as a security, or to prevent other creditors from coming upon the debtor's goods, is fraudulent as to them, and will be postponed to subsequent levies. And stay, or unusual delay of the proceedings, allowing the debtor to sell or otherwise to deal with the goods in contravention of the levy, and other acts of similar nature, give rise to a presumption of want of good faith. Dorrance's Admr. v. Com., 13 Pa. 159; Earl's Appeal, 13 Pa. 483; Freeburger's Appeal, 40 Pa. 244."

A lien claimant undoubtedly is entitled to rebut the presumption of want of good faith. Under the facts, we reach the conclusion that the appellant, the lien claimant here, made his levy solely for the purpose of acquiring a lien and without a genuine intention of proceeding promptly for the collection of his debt. He postponed all action until such time as the debtor was obviously insolvent and within four months of the bankruptcy. He has not met

the test of good faith and has therefore failed to establish liens upon the fund.

The decree is affirmed.

A true Copy: Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

In United States Circuit Court of Appeals for the Third Circuit, March Term, 1933

No. 5088

John N. Mixnich, Appellant,

vs.

Russell Gardner et al., Intervening Creditors, and D. C. Reilly, Esq., Trustee of King Motor Co., Bankrupt, Appellees

Decree—Filed July 12, 1933

Appeal from the District Court of the United States for the Western District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, July 12, 1933.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

[File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed Aug. 2, 1933

To the Honorable the Justices of the United States Circuit Court of Appeals for the Third Circuit:

John N. Minnich, appellant in the above stated case, hereby petitions your Honorable Court for a rehearing in this cause for the following reasons:

That an error exists in the chronology of the proceedings as detailed in the statement of facts in your opinion filed in this case on July 12, 1933, and it is evident that your Honorable Court decided the case with a misunderstanding of the facts. This misunderstanding is of the time when the sheriff advertised the property for sale which is the controlling act of this case. Your Honorable Court in its opinion stated:

"On August 21, 1930, the appellant instructed the sheriff to advertise the goods of the King Motor Company for sale and to sell the same immediately. On August 25, 1930, a receiver in equity was appointed for the King Motor Company by the Court of Common Pleas of Bedford County. The sheriff advertised on August 29, 1930. On August 30, 1930, an involuntary petition in bankruptcy was filed against the King Motor Company * * *."

The appointment of a receiver is given as antedating the advertisement by the sheriff. The correct facts are that on August 21, 1930, the appellant instructed the sheriff to advertise and the sheriff advertised on August 21, 1930 (R. 14, 15, 38-39). On August 25, 1930, a receiver was appointed and on August 30, 1930, the involuntary petition in bankruptcy was filed. The advertisement of the sale of the property by the sheriff on August 21, 1930, was the positive action which revived the priority of the lien of the appellant and this revival was four days before a receiver was applied for and nine days before the petition in bank-

ruptcy was filed. With the facts of this case corrected they are precisely similar to the facts of In re Zeis, 245 F. 737 (C. C. A. 2) and In re Schwab Printing Co., 59 F. (2d) 726 (C. C. A. 7) and appellant respectfully submits that these citations should control.

At the argument of this case the time was too limited, owing to the arrival of the hour for adjournment, for the appellant to fully present his contention to your Honorable Court. The appellant contends that the lien acquired by virtue of his levy, even if liable to be postponed by subsequent levies, which is all that has ever been held to result from a dormancy in any Pennsylvania case (including Platt-Barber Co. v. Groves cited by your Honors), was good as against the debtor. That the appellant having given positive instructions to the sheriff to proceed and positive action having been taken by the sheriff by posting the advertisement of the sale of the property four days before any action for a receiver and nine days before the filing of the petition in bankruptcy, this positive action revived the priority of his lien. That the revival was not of the lien but of its priority and dated back to the time of the levy, and no new lien was created at this time which would be void because within the four months period under section 67 (f) of the Bankruptcy Act. This has been clearly held in In re Zeis, supra, and in that case action was postponed by the execution creditor in a hope that bankruptcy proceedings could be avoided.

In its opinion your Honorable Court holds that appellant "postponed all action until such time as the debtor was obviously insolvent * * *." It is respectfully submitted that with the facts corrected no evidence appears in the record to support this conclusion.

Your petitioner therefore prays your Honorable Court to set the above matter down for reargument and that a day be set so that the interested parties may appear and that the record be retained by your Honorable Court until an opportunity has been given plaintiff to be heard.

And he will ever pray, etc.

John N. Minnich, Appellant.

Duly sworn to by John N. Minnich. Jurat omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed Oct. 2, 1933

And now, to wit, October 2, 1933, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 15, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,272. U. S. Circuit Court of Appeals, Third Circuit. Term No. 669. John N. Minnich, Petitioner, vs. Russell Gardner et al., Intervening Creditors, and D. C. Reiley, Trustee of King Motor Co., Bankrupt. Petition for a writ of certiorari and exhibit thereto. Filed December 18, 1933. File No. 669. O. T., 1933.

FILE COPY

Office Supreme Court, U. S.
FILED
DEC 18 1933
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 669

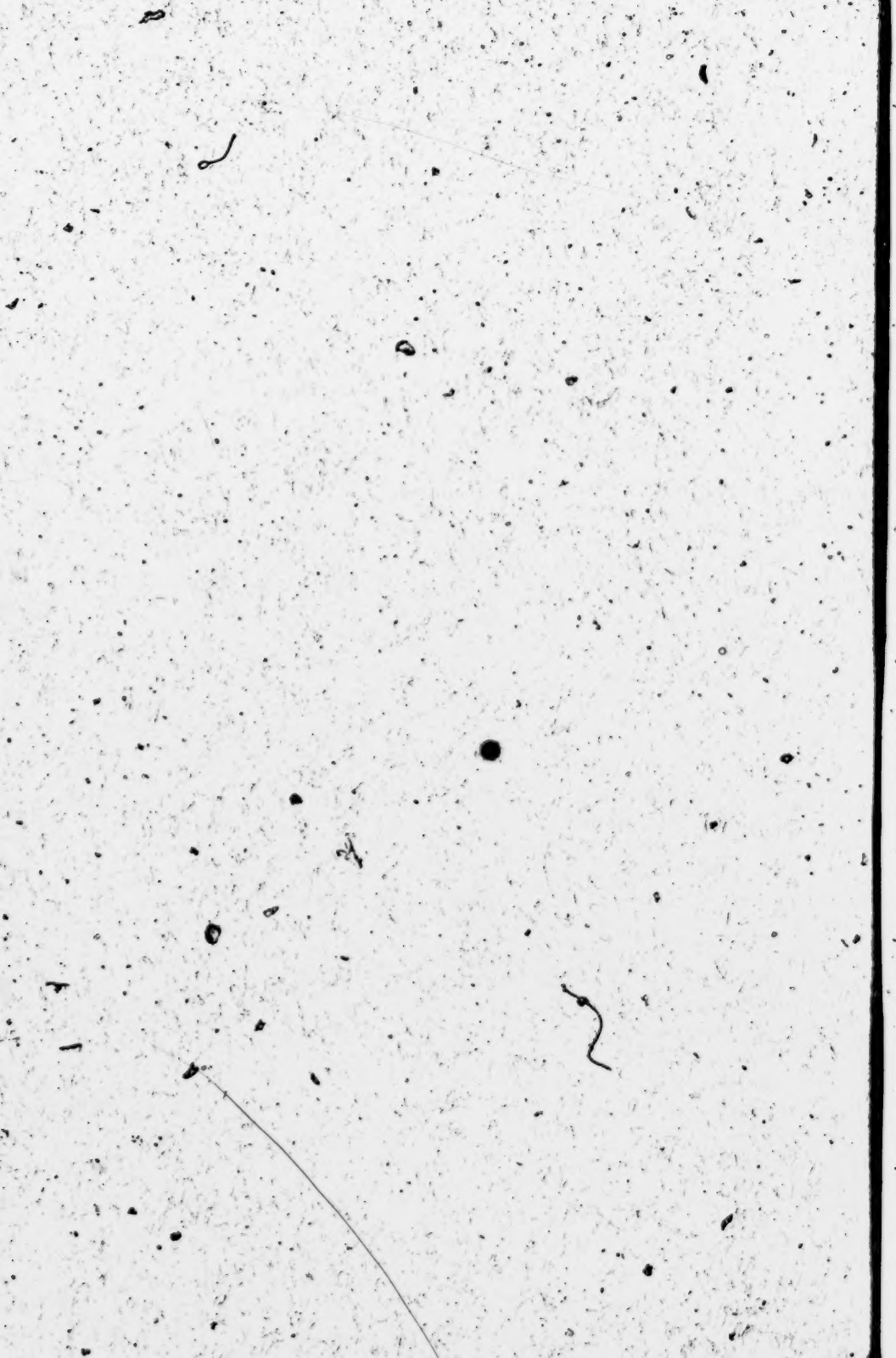
JOHN N. MINNICH, PETITIONER,

vs.

RUSSELL GARDNER, ET AL., INTERVENING CREDITORS, AND D. C. REILEY, ESQ., TRUSTEE OF KING MOTOR CO., BANKRUPT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HENRY GEORGE GRESS,
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 669

JOHN N. MINNICH, PETITIONER,

vs.

RUSSELL GARDNER, ET AL., INTERVENING CREDITORS, AND D. C. REILEY, ESQ., TRUSTEE OF KING MOTOR CO., BANKRUPT, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, John N. Minnich, respectfully represents:

1. That on March 21, 1929, your petitioner entered a judgment against the King Motor Company, a corporation, in the Court of Common Pleas of Bedford County, Pennsylvania. On March 26, 1929, petitioner caused execution to be issued upon the judgment and the writ was received by the sheriff on that day (R. 13, 32). The writ was returnable the third Monday of April, 1929 (R. 13, 32). On March 27, 1929, the sheriff levied upon the personal property of the King Motor Company and indorsed his levy upon the writ (R. 13, 33).

By the law of Pennsylvania a levy indorsed on a writ of execution before the return day thereof is a lien from the

time the writ was received by the sheriff until divested by subsequent sale, and it is text law that a sheriff may sell on an execution after the return of his writ.

2. The sheriff did not sell before the return day of the writ and returned the writ on April 15, 1929, "goods on hand not sold" (R. 13, 34). On April 18, 1929, petitioner caused a writ of *vend. ex.* to be issued (R. 13, 34); on September 4, 1929, an alias writ of *vend. ex.* (R. 13, 36); and on November 13, 1929, January 22, 1930, and April 30, 1930, pluries writs of *vend. ex.* (R. 13, 36). Each of these writs, except the last which was in the sheriff's hands at the time of the filing of the petition in bankruptcy hereinafter referred to, was returned either with the endorsement "goods on hand not sold, writ not executed for want of time," or "goods on hand not sold" (R. 13, 36).

The writs of *vend. ex.* created no new liens because, in Pennsylvania, a writ of *vend. ex.* is a secondary writ which creates no new lien on personal property; it is simply the writ under which the sheriff sells by virtue of the levy on a previous writ. It is proper where personal property is levied upon and the writ returned by the sheriff, goods on hand not sold, to issue a *vend. ex.* directing the sheriff to sell.

3. The petitioner did not enter into any agreement with the defendant nor did he in any way interfere with these several writs (R. 27, 29, 30). It is conceded, however, that under the law of Pennsylvania on account of the delay of almost seventeen months, apparently acquiesced in by the petitioner, the execution became dormant, and the lien would have been postponed to other executions subsequently issued while the dormancy continued. No executions were issued, no receiver was appointed, and no petition in bankruptcy was filed during the dormancy.

4. *On August* 21, 1930, *the petitioner instructed the sheriff to advertise for sale the goods of the King Motor Company which had been levied upon on March* 27, 1929, *and to sell the same immediately* (R. 14, 20, 29). *On the same day, to wit, August* 21, 1930, *the sheriff advertised the goods for sale* (R. 14, 20, 29, 38). *The sale was to be held on August* 29, 1930 (R. 38).

By the law of Pennsylvania, by general law, and by the law as laid down by at least two Circuit Courts of Appeals, the instructions given by the petitioner to the sheriff to proceed and the positive action of the sheriff advertising the sale of the property revived the priority of petitioner's lien. That revival was not of the lien but of its priority and dated back to the time of the levy. No new lien was created at this time which would be void because within the four month period under Section 67 (*f*) of the Bankruptcy Act.

5. From the time of entering of the judgment on March 26, 1929 (R. 13, 32), until over two months after the issuing of the last *vend. ex.* on April 30, 1930 (R. 13, 36), the defendant in the execution was solvent. The defendant was insolvent for a period of thirty to forty-five days preceding August 25, 1930 (R. 28), or, in other words, not earlier than July 11, 1930.

6. On August 25, 1930, a receiver in equity was appointed by the Court of Common Pleas of Bedford County, Pennsylvania, and the writ of the petitioner was ordered stayed by the court until the final determination of the matter (R. 15, 39). By the law of Pennsylvania the lien of the levy continued by operation of law.

7. On August 30, 1930, an involuntary petition in bankruptcy was filed against the King Motor Company (R. 1)

which was adjudged a bankrupt on September 19, 1930 (R. 16), and a trustee in bankruptcy was appointed (R. 16).

By the bankruptcy law as interpreted by this Court, the trustee taking under the rights of an execution creditor as of the date of filing of the petition in bankruptcy, and not earlier, took the property of the King Motor Company subject to the lien of the petitioner's levy thereon existing for more than four months before.

8. Written notice was given the trustee that petitioner had a lien upon the personal property of the King Motor Company by virtue of the levy of March 27, 1929, and that it should be sold separate and apart from other property of the bankrupt (R. 16, 29, 30). After the appraisement of the personal property the referee held a meeting, which was attended by one of the counsel for the wage claimants and others, and the articles upon which the sheriff had levied on March 27, 1929, were marked, separated and listed separately from those which had not been levied upon (R. 16, 30). The personal property consisted mostly of tools, machinery, furniture and fixtures, being principally the equipment of a large garage, as is shown by the levy of the sheriff endorsed on the writ (R. 33). It was agreed at a meeting of the creditors to sell the property, upon which the petitioner had a lien, separate from the other property of the bankrupt. All of the personal property of the company was sold by the piece, but only one sale list was kept. The trustee and petitioner with the referee and other creditors went over the sale list, comparing it with the separated inventories, to separate the selling prices of the articles upon which the petitioner had a lien from those upon which he did not; and it was agreed by the trustee and the petitioner, after the comparison, that fifty per cent of the sale, or $1,776.17, represented the value of

the property upon which the petitioner had a lien (R. 17, 30).

9. The referee awarded the agreed amount of $1,776.17 less $18.38, the costs which would have been necessary if the goods had been sold by the sheriff, or $1,757.79, to the petitioner under his lien (R. 17, 21), holding that the petitioner had a valid lien more than four months old upon the personal property levied upon on March 27, 1929, and that, if the lien had become dormant, its priority had been revived by the petitioner directing the sheriff to sell and by the advertisement of the sale (R. 20).

10. Upon the referee's certificate for review (R. 40-41-42-43), the district court of the United States for the Western District of Pennsylvania decreed that the writ of execution did not entitle the petitioner to valid liens against the fund, nor to any distribution in preference to the priority wage claims (R. 46). No opinion was filed by the district court.

11. Your petitioner appealed to the United States Circuit Court of Appeals for the Third Circuit from said order disallowing said liens (R. 48). After consideration, that court, on July 12, 1933, affirmed the decree of the district court (R. 53).

12. In the opinion filed by the circuit court an error existed in the chronology of the proceedings as detailed in the statement of facts. The court stated: "The sheriff advertised on August 29, 1930." This placed the advertisement four days after the appointment of a receiver. The correct date of the advertisement by the sheriff is August 21, 1930 (R. 14, 20, 29, 38), four days before the receiver was appointed (R. 14, 39) and nine days before the involuntary petition in bankruptcy was filed (R. 1).

13. Thereupon, on August 2, 1933, the petitioner filed a petition for rehearing (R. 55), specially calling the court's attention to the error in the chronology of the facts. He also called the court's attention to the fact that the facts of the case at bar, corrected, are precisely similar to those of *In re Zeis*, 245 Fed. 737, a case wherein the decision of the Circuit Court of the Second Circuit and the decision of the circuit court in the case at bar are in direct conflict. The petition for rehearing was denied on October 2, 1933 (R. 59).

14. Upon the petitioner's request to file a petition praying for a correction of the facts, the court accepted the correction and the record has been certified with the correct date, to wit: "The sheriff advertised on August 21, 1930." (The advance sheets of the Federal Reporter give the date incorrectly.)

Your petitioner, by the decree of the Circuit Court of Appeals for the Third Circuit, if the same shall not be corrected, will be deprived of a lien upon the proceeds of the personal property aforesaid, which lien exists by virtue of the levy of March 27, 1929, made by the sheriff more than four months before the petition in bankruptcy was filed against the King Motor Company; and which lien, if dormant, had been revived nine days before the filing of the petition.

Your petitioner says that the ruling of the circuit court of appeals is contained in the following paragraph of the opinion:

> "A lien claimant undoubtedly is entitled to rebut the presumption of want of good faith. Under the facts, we reach the conclusion that the appellant, the lien claimant here, made his levy solely for the purpose of acquiring a lien and without a genuine intention of proceeding promptly for the collection of his

debt. He postponed all action until such time as the debtor was obviously insolvent and within four months of the bankruptcy. He has not met the test of good faith and has therefore failed to establish liens upon the funds."

Your petitioner further says that even if the conclusion of the circuit court, that "the lien claimant here, made his levy solely for the purpose of acquiring a lien and without a genuine intention of proceeding promptly for the collection of his debt," is admitted, still the lien was not void. It was good against the defendant in the execution from the date of its issue until the petition in bankruptcy was filed. The execution was dormant and would have been postponed to other executions subsequently issued while the dormancy continued; but no executions were issued, no receiver was appointed, and no petition in bankruptcy was filed during the dormancy.

Your petitioner further says that even if the finding of the circuit court, that "He postponed all action until such time as the debtor was obviously insolvent and within four months of bankruptcy," be admitted, still it does not avoid either the lien or the revival of the priority of the lien. The debtor was solvent when the lien was obtained more than four months prior to the filing of the petition in bankruptcy. A lien obtained through legal proceedings must have been acquired within the four month period immediately preceding the filing of the petition in bankruptcy to be affected by insolvency. The action taken was the directing of the sheriff to proceed and the advertisement by the sheriff. This created no new lien—it only revived the priority of the lien created seventeen months before. The enforcement, within the four month period, of an existing lien is not denounced by the Bankruptcy Act.

Your petitioner further says that the circuit court of appeals, under the facts of this case, should have found and

held that your petitioner's lien had been acquired more than four months prior to, and, though dormant, had been revived nine days before, the filing of the petition in bankruptcy and was effective against the trustee in bankruptcy. This question has not been passed upon by this Court so far as we are advised. It has been passed upon by the Circuit Courts of Appeals for the Second and Seventh Circuits. The decisions of those courts are in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in this case, and it is in the interest of jurisprudence and uniformity of construction and application of the Bankruptcy Act, that the question be finally determined by this Court.

Your petitioner further says that the rulings made by the Circuit Court of Appeals are in conflict with the applicable local decisions of the Supreme Court of Pennsylvania, in conflict with general law, and in conflict with the decisions of the Federal Courts.

Your petitioner further says that the Circuit Court of Appeals has misconstrued and misapplied the Federal Bankruptcy Act in making the decision herein sought to be reviewed.

The question of local, general, and federal law thus presented in this case are of much importance, and of such character that it is probable that they will arise in other cases. Those questions have never yet been passed upon by this Court so far as we have been able to ascertain. For these reasons, as well as to remedy the wrong done to your petitioner, a writ of certiorari should issue in this case.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Third Circuit, commanding that court to certify and to send

for this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 5088, John N. Minnich, appellant, *vs.* Russell Gardner, *et al.*, Intervening Creditors, and D. C. Reiley, Esq., Trustee of King Motor Co., Bankrupt, Appellee, to the end that said case may be reviewed and determined by this Court, as provided by law, and that the judgment of said circuit court of appeals may be reversed by this Court, and that your petitioner may have such other and further relief or remedy as may be just.

JOHN N. MINNICH,
Petitioner.

HENRY GEORGE GRESS,
Counsel for Petitioner.

STATE OF PENNSYLVANIA,
County of Bedford, ss:

John N. Minnich, being duly sworn says that he is the petitioner, and that the allegations of this petition are true, as he verily believes.

JOHN N. MINNICH.

Subscribed and sworn to this 4th day of December, 1933, before me.

[SEAL.] D. CRESS REILEY,
Notary Public.

My commission expires March 4, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 669

JOHN N. MINNICH, PETITIONER.

vs.

RUSSELL GARDNER ET AL., INTERVENING CREDITOR, AND D. C. REILEY, ESQ., TRUSTEE OF KING MOTOR COMPANY, BANKRUPT, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Reference to Opinions Below.

The petitioner in this case seeks review of a judgment of the Circuit Court of Appeals for the Third Circuit in John N. Minnich *vs.* Russell Gardner, *et al.*, Intervening Creditors, and D. C. Reiley, Esq., Trustee of King Motor Co., Bankrupt, affirming a judgment of the United States District Court for the Western District of Pennsylvania. The district court filed no opinion, but the decree of said Court is found in the Transcript of Record at page 46. The opinion of the Circuit Court of Appeals is reported, 66 F. (2d) 561 (R. 51).

Statement of Grounds of Jurisdiction Invoked.

The judgrment of said circuit court of appeals sought to be reviewed was rendered July 12, 1933, (R. 58). A peti-

tion for rehearing was filed August 2, 1933, and was denied October 2, 1933 (R. 59). In the Circuit Court of Appeals, as well as in the District Court, the petitioner claimed to be entitled to a lien upon certain personal property by virtue of a levy more than four months prior to the filing of the petition in bankruptcy (R. 45, 47).

The petitioner's lien had been recognized and allowed by the Referee in Bankruptcy (R. 12-21). It was disallowed by the district court (R. 46), and the judgment of the district court was affirmed by the circuit court of appeals (R. 51).

The jurisdiction is invoked under Section 240 (*a*) of the Judicial Code, as amended by the Act of February 13, 1925, U. S. Code, Title 28, Sec. 347.

Statement of the Case.

A full statement of the facts necessary to an understanding of this case has been made in the petition in the numbered paragraphs 1 to 14, and in the interest of brevity the statement is not repeated at this point.

Specification of Error.

The errors asserted and intended to be urged in this Court are as follows:

1. The affirmance of the circuit court of appeals of the judgment of the district court disallowing the petitioner's claim to a lien for $1,776.17, the value of the personal property levied upon by the sheriff more than four months prior to the filing of the petition in bankruptcy.

2. The learned Circuit Court of Appeals for the Third Circuit erred in failing to find and hold that petitioner's lien was not extinguished as against the defendant, and on directions to proceed with the sale its right to priority was revived as against any subsequently acquired liens.

3. The learned Circuit Court of Appeals for the Third Circuit erred in failing to find and hold that petitioner's lien had been acquired more than four months prior to, and, though dormant, had been revived nine days before, the filing of the petition in bankruptcy and was effective against the trustee in bankruptcy.

ARGUMENT.

Summary.

Under the law of Pennsylvania, the petitioner's lien, if the levy was made solely for the purpose of acquiring a lien and without a genuine intention of proceeding promptly with the collection of his debt, was good against the defendant in the execution from the date of the issuing of the execution to the date of the filing of the petition in bankruptcy.

Under the law of Pennsylvania, petitioner's lien was dormant.

Under the law of Pennsylvania, if petitioner's lien had become dormant by delay in proceeding, the instructions given by him to the sheriff to proceed and the positive action taken by the sheriff in advertising the sale before the filing of the petition in bankruptcy revived its priority, and it was effective against the trustee in bankruptcy.

A lien created more than four months prior to the filing of the petition in bankruptcy is not avoided by the Bankruptcy Act.

The judgment of the circuit court of appeals is in conflict with applicable local decisions.

The judgment of the circuit court of appeals is in conflict with the decisions of other federal courts.

Under the Law of Pennsylvania, the Petitioner's Lien, if the Levy Was Made Solely for the Purpose of Acquiring a Lien and Without a Genuine Intention of Proceed-

ing Promptly With the Collection of His Debt, Was Good as Against the Defendant in the Execution from the Date of the Issuing of the Execution to the Date of the Filing of the Petition in Bankruptcy.

Accepting the conclusions of the circuit court to be true that "the lien claimant here, made his levy solely for the purpose of acquiring a lien and without a genuine intention of proceeding promptly for the collection of his debt," nevertheless the petitioner's lien was good as against the defendant in the execution.

The courts of Pennsylvania so hold:

In *Kent, Santee & Co.'s Appeal*, 87 Pa. 165, p. 167, the Supreme Court of Pennsylvania held:

> "The law does not favor an execution for the mere purpose of a lien. There is a line of cases which hold that instructions to the sheriff to stay proceedings, or not to proceed upon an execution, or which indicate that it was issued not for the purpose of levy and sale, but for the purpose of lien, and to acquire security for the debt, will destroy the lien as to purchasers and subsequent execution creditors: * * * (*quoting cases*) * * * *This is a matter, however, of which the defendant cannot complain. The execution in such cases is good against him. It is postponed only as to purchasers and subsequent execution creditors.*" (Italics ours.)

A levy upon personal property made by virtue of a fi. fa. before the return day of the writ will support a sale of the property held upwards of eight years afterwards, *Lewis* v. *Smith*, 2 Sergeant & Rawle (Pa.) 142, at 159 and 165. Where goods levied on have not been removed by the sheriff, though they remain unsold above two years, the plaintiff does not lose his lien. *Perit* v. *Willis*, 2 Yeates (Pa.) 524. *Keyser's Appeal*, 13 Pa. 409, was a case wherein the first execution creditor directed that a store, upon the stock

of which the sheriff had levied, should be left open and goods sold by a clerk, and while this state of facts continued other executions were subsequently issued. In the distribution, the court directed the money first to be paid to the subsequent executions, and the balance, if any, to be paid to the first execution.

In *McLaughlin* v. *McLaughlin*, 85 Pa. 317, at 322, Mr. Justice Woodward, speaking for the Supreme Court of Pennsylvania, said:

> "Even a stay of proceeding on a writ levied on personal property, does not involve the loss of the lien, and does not affect the plaintiff's right against the defendant or the goods, although it exposes him to the risk of having his execution postponed."

Levies made upon writs on September 11, 1891, would be sufficient as against the defendant to support writs of *venditioni exponas* issued on March 3, 1893, a period of over seventeen months, *Sweet* v. *Williams*, 162 Pa. 94, p. 100. Where an execution was issued July 10, 1894, and the sale stayed by the plaintiff until March, 1895, over seven months, the court said: "Were the liens lost? Certainly not as against the defendant in the judgment * * *", *Gillespie* v. *Keating*, 180 Pa. 151, p. 155. Directions given by an execution creditor to stay all further proceeding on his execution, until further directions, is a waiver of his priority in favor of a second execution received by the sheriff *during the continuance of the stay: Metz* v. *Hamman*, 5 Wharton (Pa.), 150. Also see *Morrison's Appeal*, 1 Pa. 13.

> "A direction to delay proceedings upon a writ of fieri facias, or any act evincing an intention not to have a sale of the property but to hold the writ for purpose of lien, is a waiver of priority in favor of another writ coming into the hands of the sheriff *in the*

meantime." Syllabus: Appeal of Stroudsburg Bank, 126 Pa. 523. (Italics ours.)

The latest expression of the Pennsylvania courts was on October 2, 1933, when Judge Parker, in speaking for the Superior Court in *Geha* v. *Baltimore Life Insurance Co.*, 168 A. 527, at 528, said:

> "It is true that one may not hold a lien by virtue of an execution to the detriment of other creditors, but this does not mean that the writ is void."

General Law—Delay in executing writ:

In 23 C. J., p. 513-514, Sec. 368 (*a*), the law is stated as follows:

> "If plaintiff delivers an execution to the sheriff with a direction not to levy at all, or until further orders, or to levy and hold without sale, or if similar orders are given after delivery or after the levy, it creates no lien on defendant's property as against a creditor issuing and proceeding with a subsequent execution, or as against bona fide purchasers or other lien holders. * * * *But as against the defendant in the execution or his personal representatives or heirs, the mere suspension of the execution will not affect the lien.*" (Italics ours.)

And in Freeman on Executions, Vol. 2, sec. 206, p. 1043:

> "But as against the defendant in execution or his personal representatives or heirs or others not acquiring rights or liens, the mere suspension of the execution has no effect on its lien."

United States Courts so holding:

In re Zeis, 245 Fed. 737; *Crane* v. *Penney*, 2 Fed. 187.

Courts of other States which so hold:

Keel v. *Larkin*, 72 Ala. 493; *Dryer* v. *Graham*, 58 Ala. 623; *Weldon* v. *Rogers*, 157 Cal. 410; *Terry* v.

Americus Bank, 77 Ga. 528; *Griffin* v. *Wallace*, 66 Ind. 410; *Locke* v. *Coleman*, 2 T. B. Mon. (Ky.) 12; *Hurlbutt* v. *Currier*, 68 N. H. 94; *Peck* v. *Tiffany*, 2 N. Y. 451; *Richards* v. *Allen*, 3 E. D. Smith (N. Y.) 399; *Arrington* v. *Sledge*, 12 N. C. 359.

Under the Law of Pennsylvania Petitioner's Lien was Dormant

The long delay of seventeen months, apparently acquiesced in by the petitioner, would be such a course of conduct having the same effect as if instructions had been given not to proceed, 23 C. J., Sec. 368, p. 515, and the execution would be considered as dormant.

In *Eberle* v. *Mayer*, 1 Rawle (Pa.) 366, at 369, the court said;

> "Where goods were left with plaintiff (that was not fraud per se) but instructions given not to proceed until further direction was, 'of itself, a waiver of his priority, in favor of a second execution, received by the sheriff during the pendency of the stay; in other words, that by the order, the plaintiff's execution must be considered as dormant, * * *."

The petitioner's lien, though dormant, was good as against the defendant in the execution from the date of its issue March 26, 1929, to the date of the filing of the petition in bankruptcy, during the period of dormancy it was liable to be postponed to any subsequent execution which might have come into the hands of the sheriff or to a petition in bankruptcy if one should have been filed while the lien was dormant.

Under the Law of Pennsylvania, if Petitioner's Lien had Become Dormant by Delay in Proceeding, the Instructions Given by Him to the Sheriff to Proceed and the Positive Action Taken by the Sheriff in Advertising the Sale Before the Filing of the Petition in Bankruptcy Revived Its Priority and It Was Effective Against the Trustee in Bankruptcy.

When an execution has become dormant by a perversion of the writ, if, before any subsequent execution has come into the hands of the sheriff, the execution creditor orders the sheriff to proceed, the lien is safe.

In Pennsylvania, the rule as to revival of a dormant lien is clearly expressed in the language of Sharswood, P. J., in *Deacon v. Gorett*, 4 Phila. (Pa.) 7, as follows:

> "Upon the question of priority between execution creditors, where the first execution creditor has instructed the sheriff not to proceed, or has given no instructions, the cases are legion a whole volume might be written to reconcile them. We think, however, that one thing is or ought to be clear, that whatever laches an execution creditor may have been guilty of, if, before any subsequent execution has come to the hands of the sheriff, he wakes up and orders the sheriff to proceed, he is safe."

If a writ clearly issued merely as a security, and the creditor can prove affirmatively that orders to proceed were given before a subsequent writ is received by the sheriff, the first writ still has priority. See *Freeburg's Appeal*, 40 Pa. 244.

General Law—Effect of subsequent instructions to execute writ where the execution creditor has once lost his priority of lien by a perversion of the writ:

In 23 *C. J.* Sec. 368, p. 515, the law is given as follows:

> " " " such instructions will revive his execution, and give priority from the time the instructions were

given, as against creditors acquiring liens subsequent to such instructions."

And in *Freeman on Executions*, Vol. 2, Sec. 206, p. 1043:

> "If the plaintiff, after stay or suspending its execution, direct the officer to proceed, the lien will be revived and made paramount to all writs received by the officer after such direction to proceed."

United States Courts so holding:

In re Zeis, 245 Fed. 737;
In re Schwab Printing Co., 59 F. (2d) 726;
In re Gulport Furniture Co., 4 F. Supp. 489.

Courts of other states which so hold:

Sparre v. *Abbott*, 40 Ill. A. 646;
Miller v. *Kosch*, 74 Hun. (N. Y.) 50, 26 N. Y. S. 183.

From these decisions of the courts of Pennsylvania, supported by general law and the decisions of other courts, it is manifest that even if we assume that the petitioner's execution had been clearly issued as a lien and had become dormant from lapse of time, nevertheless it was, as against the defendant in execution, good during the whole period from March 26, 1929, the date the execution was issued, to August 30, 1930, the date of the filing of the petition in bankruptcy.

And further assuming it to have become dormant, it was, by the directions given to the sheriff to proceed with the sale and by the positive action taken by the sheriff, revived nine days prior to the filing of the petition in bankruptcy.

Adopting the following from *In re Zeis*, *supra*, as if they were our own words:

> "Unless, therefore, it can be said that the trustee acquired the rights or status of a bona fide purchaser or junior execution creditor during the time the proceedings were suspended, the lien is good as against

him, and must be recognized by the bankruptcy court. It is clear that a trustee in bankruptcy is not a bona fide purchaser. *Zartman* v. *First National Bank*, 216 U. S. 134, 138. And also it is settled that the trustee occupies the position of a creditor with an execution issued and levied upon the date of the filing of the petition in bankruptcy, and not earlier. *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 269.

"The revival arising from an instruction to proceed was not the revival of the lien, but a revival of the priority of the lien. No new lien was created, which would be void because within the four months' period under section 67 *f* of the Bankruptcy Act. When an execution is deemed to be dormant, it simply means that the lien has lost its priority in favor of another execution or person acquiring certain rights during the period of dormancy. The lien as such, which is the right to satisfy the debt out of the property levied upon, still remains. The property is still charged with that lien while the execution of the writ is suspended: the only difference being that other executions, etc., may come in and fasten on the property and be satisfied first. If the property is sold under such circumstances, while the later executions may successfully claim to be satisfied ahead of the one which became dormant, the so-called dormant execution will be paid out of any surplus remaining after the satisfaction of the others. That is all that has ever been held to result from a dormancy, so-called."

We submit that *Platt-Barber Co.* v. *Groves*, 193 Pa. 475, the only case cited by the circuit court of appeals, is a case dealing with a senior and junior execution and discusses only the general law of Pennsylvania as to the postponement of liens. The question of the revival of a dormant lien is not considered therein. Furthermore, Mr. Justice Mitchell does not say that a perverted lien is void as to everyone, he merely holds it to be postponed to subsequent levies.

The case of *Freeburg's Appeal, supra*, is authority for the doctrine that even if the writ issued clearly for a lien, yet if the creditor can prove affirmatively that orders to proceed were given the sheriff before any subsequent writ was received by him, the first writ still has priority. Assuming that petitioner's execution was issued clearly for a lien, the fact has been affirmatively proven that the sheriff was ordered to proceed (R. 14, 20, 29) and did proceed (R. 14, 20, 29, 38) before the filing of the petition in bankruptcy (R. 1)—which is the same as if the trustee in bankruptcy had issued an execution on the date of filing the petition. The circuit court of appeals in its opinion finds every fact necessary to revive the lien of the petitioner and give its priority to the bankruptcy proceedings. Quoting from the court's opinion: "On August 21, 1930, the appellant instructed the sheriff to advertise the goods of the King Motor Company for sale and to sell the same immediately" (R. 52). "The sheriff advertised on August 21, 1930" (R. 52). "On August 30, 1930, an involuntary petition in bankruptcy was filed against the King Motor Company" (R. 52). We respectfully submit that we cannot understand how the circuit court could seemingly overrule the law as laid down by the Supreme Court of Pennsylvania.

A Lien Created More Than Four Months Prior to the Filing of the Petition in Bankruptcy is not Avoided by the Bankruptcy Act.

The circuit court of appeals in its opinion states: "He postponed all action until such time as the debtor was obviously insolvent and within four months of bankruptcy" (R. 53). Insolvency has no bearing on the case. The lien was obtained on March 26, 1929 (R. 32), seventeen months prior to the filing of the petition in bankruptcy on August 30, 1930 (R. 1). In order to be affected by the provisions

of the Bankruptcy Act a lien obtained in legal proceedings must have been acquired within the four months immediately preceding the filing of the petition in bankruptcy. See *Metcalf* v. *Barker*, 187 U. S. 165.

The recognition of the petitioner's lien does not violate, in any way, either the letter or spirit of the bankruptcy law. In *Straton* v. *New*, 283 U. S. 318, the doctrine is recognized that, while the bankruptcy law contains no express provision for preserving liens acquired by legal proceedings more than four months before the petition is filed, it is clearly implied that they shall be saved from the operation of the law, for Section 67-*f* (U. S. C. A., Sec. 107 (*f*)) voids only liens obtained by legal proceedings within the four month period. It follows from this that those liens acquired through legal proceedings more than four months prior to the filing of the petition, if valid under state law, are preserved and "will be accorded priority by the bankruptcy court in distribution of the estate in accordance with the applicable local law." And as was said by this Court in *Metcalf* v. *Barker*, *supra*:

> "It is the lien created by a levy * * * that is invalid, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed null and void on adjudication, but its validity is recognized, * * * A judgment or decree in enforcement of an otherwise valid preexisting lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens."

Petitioner's lien was acquired more than four months prior to the filing of the petition. No new liens were created by the issuing of the vendices. *A vend. ex.* in Pennsylvania is simply a writ under which the sheriff sells by virtue of the levy on a previous writ. See *Neil* v. *Colwell*,

66 Pa. 216; *McLanahan v. Goodman*, 265 Pa. 43. The instructions to the sheriff to sell (R. 14, 20, 29) and his advertisement of the sale (R. 14, 20, 29, 38), did not create a new lien. These positive acts only revived the *priority* of the lien which already existed—the revival was not of the lien but of its *priority*, and dated back to the time the execution became a lien on March 26, 1929. See *In re Zeis*, 245 Fed. 737.

In re Schwab Printing Co., decided June 25, 1932, in the United States Circuit Court of Appeals, Seventh Circuit, 59 F. (2d) 726, is substantially similar to the case now before the court. In that case an execution had been issued and was dormant for a period of five months, after which positive action was taken and the goods advertised for sale. Three days after the advertising of the goods for sale by the sheriff an involuntary petition in bankruptcy was filed. It was held that the lien of a dormant levy may have its priority revived by a positive act indicating a purpose to make the levy effective. And a judgment debtor's trustee in bankruptcy takes personalty subject to the lien of the execution levy, notwithstanding the delay in proceedings to realize thereon, where the property was advertised for sale prior to bankruptcy. Judge Alschuler, in speaking for the court, says:

> "But if appellee's lien did become dormant through delay in causing sheriff to proceed to sale thereunder, it ceased to be dormant when positive action was taken looking toward its assertion and the sale of the chattels levied on. This occurred * * * when the sheriff advertised for sale the press and folding machine under the Butler execution. The lien of a levy which has become dormant may have its priority revived by a positive act indicating a purpose and undertaking to make it effective, and this will relate back to the time the judgment became a lien. *Metcalf v. Barker*, 187 U. S. 165, 23 S. Ct. 47 L. Ed. 122;

Straton v. *New*, 283 U. S. 318, 51 S. Ct. 465, 75 L. Ed. 1060; *In re Zeis, supra* (245 F. 737).

"When, therefore, the bankruptcy intervened, the lien of this levy, even though dormant through delay in the proceeding to realize on the property levied upon, had been revived three days before the bankruptcy, when the property was in process of being sold under the levy. The trustee, therefore, taking under the rights of an execution creditor as of the date of filing of the petition in bankruptcy (*Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 26 S. Ct. 50, 60 L. Ed. 275; *Zartman* v. *First National Bank of Waterloo*, 216 U. S. 134, 30 S. Ct. 368, 54 L. Ed. 418; *In re Zeis, supra*), took the property in question subject to appellee's lien thereon existing for more than four months before."

The counsel for the wage claimants has continually referred to "The gross injustice which would have resulted to the wage claimants if the referee's decree of distribution had been allowed to stand." True it is under Pennsylvania law the wage claimants would have had a priority claim to the amount of $200 each, ahead of the execution creditor if the proceeding had been maintained in the state court. The wage claimants were the parties who removed the proceedings into the bankruptcy courts, they were the petitioners for the involuntary bankruptcy against the debtor. They could have perfected their right in the state court before filing the involuntary petition in bankruptcy by the filing of their claims with the sheriff or receiver. This they did not choose to do and now have no ground for complaint.

The Judgment of the Circuit Court of Appeals is in Conflict With Applicable Local Decisions.

The decisions which have been hereinbefore cited appear clearly to establish that under the law of Pennsyl-

vania circumstances which indicate an execution was issued not for purpose of levy and sale but for the purpose of a lien and to acquire security for the debt does not invalidate the lien against the defendant in the execution, it is postponed only as to purchases and subsequent execution creditors whose writs come into the hands of the sheriff while the delay continues. And when a lien is dormant, instructions to proceed revives the priority of the lien from the time the instructions are given, as against creditors acquiring liens subsequent to the instructions to proceed. The decision of the circuit court of appeals in this case conflicts with the applicable local decisions. The question of local law involved is important as affecting transactions of people not only of this state but all states which do not have a statute of limitations upon this subject.

The Judgment of the Circuit Court of Appeals is in Conflict With the Decisions of Other Federal Courts.

The ruling below also conflicts with the decisions of other Federal courts. The revival of the priority of dormant liens has been recognized as effective against the trustee in bankruptcy. *In re Zeis*, 245 Fed. 737 (C. C. A. 2); *In re Schwab Printing Co.*, 59 F. (2d) 726 (C. C. A. 7); *In re Gulport Furniture Co.*, 1 F. Supp. 489 (D. C. Miss.). Although these cases were cited below, on brief, by petitioner, the circuit court of appeals makes no mention of them in its opinion.

For this Court's consideration and comparison, the facts of the case at bar are briefly:

Execution lien dormant almost seventeen months during which time five *rend. ex.* were issued, no agreement or interference by creditor but implied consent to the delay by lapse of time. Sheriff directed to sell and advertised nine days before petition in bankruptcy was filed.

The facts of *In re Zeis, supra*, condensed are as follows:

Execution lien dormant almost five months during which time the sale was advertised and postponed many times with the consent of execution creditor. Sheriff directed to sell and advertised six days before petition in bankruptcy was filed.

The ruling of *In re Zeis, supra*, from the syllabus:

> "Where an execution becomes dormant after levy, by reason of instructions to the officer not to sell, it loses its priority of lien as against later levies or other liens acquired during the period of dormancy; but its lien is not extinguished as against the defendant, and on directions to proceed with the sale its right to priority is revived as against any subsequently acquired liens.
>
> "A trustee occupies the position of a creditor with an execution issued and levied on the date of the filing of the petition in bankruptcy, but at no earlier date; and where an execution levied more than four months prior to such date had been allowed to become dormant by successive postponements of the sale with the consent of the plaintiff, but had been revived by orders to sell on a fixed date, the lien of the levy was effective against subsequent proceedings in bankruptcy against the defendant."

In re Zeis, supra, arose from New York, a state wherein the local law of execution liens does not differ from that of Pennsylvania. In both states the Statute of 13 Eliz. c. 5 is in effect and the basis for all the decisions dealing with the postponement of liens. In neither state has your petitioner been able to find nor have adverse counsel cited a decision which holds that delay or instructions not to proceed renders an execution void as against the defendant in the writ. Numerous decisions have been examined,

including those cited by counsel, and all are in accord that in case of delay or instructions not to proceed, the creditor only loses his preference and is postponed to subsequent execution creditors whose writs come into the hands of the sheriff during the delay or stay. In the case at bar no subsequent execution was issued, no receiver was appointed, and no petition in bankruptcy was filed during the delay just as in *In re Zeis, supra*, the petition in bankruptcy was not filed until after the priority of the petitioner's lien had been revived.

The diversity of ruling between the case at bar and that of *In re Zeis, supra*, and the other cases cited emphasizes the necessity for the issuance of the writ sought in this case to the end that the correct rule may be declared by this Court.

Respectfully submitted,

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Counsel for Petitioner.

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Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1933

NO. 669.

JOHN N. MINNICH, Petitioner,

v.

RUSSELL GARDNER et al., Intervening Creditors, and D. C. REILEY, Esq., Trustee of King Motor Co., Bankrupt.

BRIEF OF RUSSELL GARDNER ET AL., WAGE CLAIMANTS, RESPONDENTS, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RUSSELL GARDNER ET AL., WAGE CLAIMANTS, RESPONDENTS, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

Respondents deny that there is any foundation for petitioner's prayer that a writ of certiorari be granted, and deny that there is any real question of law in the case.

Petitioner's unsuccessful contention has been that he has a lien of $1,776.17 (Page 12 of petitioner's Brief) against a fund of money in the hands of the trustee in bankruptcy. The alleged lien is based upon two writs of execution issued by petitioner out of the Pennsylvania court approximately eighteen months before the bankruptcy, on which writs, at about the time they were

issued, levies were made on the personal property of the bankrupt in the bankrupt's place of business. Petitioner never proceeded to sale on his writs. Said fund in the hands of the trustee was realized in the bankruptcy proceeding from the trustee's sale of the aforesaid personal property of the bankrupt.

If we accurately interpret the printed Argument which the petitioner has filed here, his present theory is that the writ of certiorari should be granted because the decision of the Circuit Court of Appeals for the Third Circuit, in the case at bar, presents a conclusion different from those reached in three decisions in other Circuits, namely, *In re Schwab Printing Co.*, 59 F. (2d) 726; *In re Zeis*, 245 F. 737, and *In re Gulfport Furniture Co.*, 1 F. Supp. 489.

That theory of the petitioner, however, would not bear analysis. Necessarily, in reaching its conclusion in the case at bar, the Circuit Court of Appeals for the Third Circuit followed the Pennsylvania law with reference to executions. It should not have done otherwise. So much was conceded in the Circuit Court of Appeals by the petitioner herein; at page 9 of his printed Brief filed in the Circuit Court of Appeals, there appeared the following:

> "By decisions so well settled as not to require citation, the law of Pennsylvania will govern as to liens created under judgments and writs of its Courts."

An inspection of the three cases aforesaid, cited and relied upon by petitioner, shows that in each of them the Court—as did the Circuit Court of Appeals in the case at bar—simply applied the statutory or other rules of the particular State with reference to the validity

of executions, in reaching its determination as to whether the particular lien was or was not valid.

That the Circuit Court of Appeals in the case at bar reached its decision by applying, to the facts, a clearly established Pennsylvania rule, can be demonstrated easily.

In Pennsylvania, the Appellate Courts have been firmly committed to the principle that, where the rights of other creditors are in any way concerned, a presumption of fraud arises against an execution plaintiff who fails or refuses promptly to proceed to sale on his writ, although the presumption may be rebutted. Justice Thompson, in the Opinion (Record, Page 52) of the Circuit Court of Appeals in the case at bar, quoting from the Opinion of the Supreme Court of Pennsylvania, in *Platt-Barber Co. v. Groves,* 193 Pa. 475 (decided in 1899) said:

> " 'The rule is well established that an execution which is not put in the sheriff's hands with the bona fide intention of collecting the debt, but merely to be held as a security, or to prevent other creditors from coming upon the debtor's goods, is fraudulent as to them, and will be postponed to subsequent levies. And stay, or unusual delay of the proceedings, allowing the debtor to sell or otherwise to deal with the goods in contravention of the levy, and other acts of similar nature, give rise to a presumption of want of good faith: *Dorrance's Admr. v. Com.*, 13 Pa. 159; *Earl's Appeal,* 13 Pa. 483; *Freeburger's Appeal,* 40 Pa. 244.' "

Further, from the Opinion of Justice Thompson in the Circuit Court of Appeals, in the case at bar, page 53 of Record, we quote:

> "Under the facts, we reach the conclusion that the appellant, the lien claimant here, made his levy solely for the purpose of acquiring a lien and without a genuine intention of proceeding promptly for the collection of his debt. He postponed all action until such time as the debtor was obviously insolvent and within four months of the bankruptcy. He has not met the test of good faith and has therefore failed to establish liens upon the fund."

Petitioner herein has in effect admitted that for about eighteen months following the levies he allowed, the bankrupt's place of business to remain open and allowed the property levied upon to be sold or offered for sale in the usual course of business (Record, Page 31).

In other words, in rejecting the petitioner's alleged and fantastic lien, all that the Circuit Court of Appeals did in the case at bar was to apply, to the rather peculiar facts existing here, and recited in the Opinion of Justice Thompson, Page 52, Record, the well understood Pennsylvania principle relating to dilatory execution plaintiffs. And that principle—we may add—had been applied again so recently as 1929 by the Superior Court of Pennsylvania in *Raskin v. Nasow,* 97 Pa. Super. 281. That the rules in other States as to the strength of the lien of a dilatory execution plaintiff may be different than the Pennsylvania rule—and that seems to be the

real burden of petitioner's prayer here—is clearly beside the question.

By the provisions of Section 47-a (2) of the Bankruptcy Statute, as to this fund in his possession, derived from goods in his possession which he sold, the trustee in bankruptcy has the status of a lien creditor. We might add also that various Pennsylvania decisions which the petitioner in the case at bar has inserted in his printed Argument, and which relate to the status of a dilatory execution creditor where the rights of other creditors are not involved, can have no possible bearing on the issue here.

We respectfully submit, therefore, that the petition should be dismissed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

NO. 669

JOHN N. MINNICH, Petitioner,

v.

RUSSELL GARDNER et al., Intervening Creditors, and D. C. REILEY, ESQ., Trustee of King Motor Co., Bankrupt, Respondents.

BRIEF FOR ARGUMENT OF RUSSELL GARDNER ET AL., RESPONDENTS.

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RUSSELL GARDNER et al., Intervening Creditors, and D. C. REILEY, ESQ., Trustee of King Motor Co., Bankrupt, Respondents.

BRIEF FOR ARGUMENT OF RUSSELL GARDNER ET AL., RESPONDENTS.

COUNTER-STATEMENT OF THE CASE.

Minnich, the petitioner, in this bankruptcy proceeding asserted a lien of $1776.17 against a fund of money in the hands of the trustee in bankruptcy (see Page 12 of petitioner's brief). The Circuit Court of Appeals (affirming the District Court for the Western District of Pennsylvania) has denied his asserted lien (see Opinion of Justice Thompson, R. Page 51). This brief is filed on behalf of Russell Gardner and others, labor claimants, holding admittedly valid and allowed priority claims, they having been appellees of record in the Circuit Court of Appeals. They are parties in interest be-

cause they will suffer, on distribution, if the alleged lien be allowed (R. Page 22).

The said fund was realized by the bankruptcy trustee from the sale of the personal property of the bankrupt in its garage at Bedford, Pennsylvania (R. Pages 16 and 17).

The alleged lien of petitioner was asserted as follows: That on March 26, 1929, which was almost 18 months before the bankruptcy petition (August 30, 1930), he as plaintiff had caused two writs of execution against the bankrupt to issue out of the Common Pleas Court of Bedford County, Pennsylvania, returnable to the third Monday of the following month (Page 1 of Petition). On said writs, levies were made on the said personal property in March, 1929, and the Sheriff made return "Goods on Hand Not Sold." At the time those writs were issued, and steadily thereafter during the seventeen or eighteen months period and until its bankruptcy, which occurred at the end of that period, the King Motor Company, the defendant in the writs (who is the bankrupt here), was a corporation engaged in the operation of an automobile accessory business and garage in Bedford. Notwithstanding the return aforesaid and the levy made by the Sheriff (R. Page 28), the goods in the defendant's (now bankrupt's) place of business were allowed to remain there for the next eighteen months and the defendant continued in business until the State Court receivership (which preceded the bankruptcy by a few days) hereinafter mentioned. During the said period and following the two said writs of execution, the plaintiff (petitioner herein) has caused to issue thereon from time to time thereafter a number (R. Page 36, *et seq.*) of writs of *vend. ex.* The petitioner herein concedes (Page 2 of petitioner's brief) that the writs of *vend. ex.* created no new rights or liens, under the Penn-

sylvania rule. After these various writs of *vend. ex.* had been issued (R. Page 12), on August 21, 1930, Minnich, the said plaintiff, petitioner herein, gave some kind of direction in writing to the Sheriff that the Sheriff must advertise the goods taken in the levy of March 26 of the previous year (R. Page 15), and at the same time, that is to say, on August 21, 1930, Minnich caused a new clause of execution to be attached to the third pluries *vend. ex.* writs, which at that time were his current writs. It is admitted that on the date last aforesaid, the defendant, now bankrupt, was insolvent (Petition, Page 3, Par. 5). On August 25, 1930 (R. Page 15) in a Common Pleas Court proceeding in Bedford County, a receiver was appointed for the defendant, King Motor Company, now bankrupt; the bankruptcy petition against it was filed five days later (R. Page 1).

As we understand, the petitioner asserts $1776.17 to be the value, in dollars, of this lien based on the two writs (Page 4 of Petition).

ARGUMENT.

The petitioner asserts here a lien based on a writ of a Pennsylvania Court. The validity of that lien will be tested, therefore, by the Pennsylvania rules applicable to such writs. See *Hiscock v. Varick Bank of N. Y.*, 206 U. S. 28, 18 A. B. R. 1. So much was conceded by the petitioner herein on Page 9 of the printed brief filed of record by him in the Circuit Court of Appeals, from which we quote as follows:

> "By decisions so well settled, as not to require citation, the law of Pennsylvania will govern as to liens created under judgments and writs of its Courts."

That the Circuit Court of Appeals in the case at bar reached its decision by applying, to the facts, a clearly established Pennsylvania rule, can be demonstrated without great difficulty.

In Pennsylvania, the Appellate Courts have been firmly committed to the principle that, where the rights of other creditors are in any way concerned, a presumption of fraud arises against an execution plaintiff who fails or refuses promptly to proceed to sale on his writ, although the presumption may be rebutted. Justice Thompson, in the Opinion (Record, Page 52) of the Circuit Court of Appeals in the case at bar, quoting from the Opinion of the Supreme Court of Pennsylvania, in *Platt-Barber Co. v. Groves*, 193 Pa. 475 (decided in 1899) said:

> "'The rule is well established that an execution which is not put in the sheriff's hands with the bona fide intention of collecting the debt, but merely to be held as a security, or to prevent other creditors from coming upon the debtor's goods, is fraudulent as to them, and will be postponed to subsequent levies. And stay, or unusual delay of the proceedings, allowing the debtor to sell or otherwise to deal with the goods in contravention of the levy, and other acts of similar nature, give rise to a presumption of want of good faith: *Dorrance's Admr. v. Com.*, 13 Pa. 159; *Earl's Appeal*, 13 Pa. 483; *Freeburger's Appeal*, 40 Pa. 244.'"

Further, from the Opinion of Justice Thompson in the Circuit Court of Appeals, in the case at bar, page 53 of Record, we quote:

> "Under the facts, we reach the conclusion that the appellant, the lien claimant here, made his levy solely for the purpose of acquiring a lien and with-

out a genuine intention of proceeding promptly for the collection of his debt. He postponed all action until such time as the debtor was obviously insolvent and within four months of the bankruptcy. He has not met the test of good faith and has therefore failed to establish liens upon the fund."

Petitioner herein has in effect admitted: that being sufficiently close to the bankrupt's (defendant's) affairs to enable him to say he was very well acquainted with its books (R. 30), for approximately eighteen months following the levies he allowed the bankrupt's place of business to remain open, and suffered and permitted the property levied upon to be openly sold and offered for sale in the usual course of defendant's business (R. 31) (Testimony Mr. King, R. 28).

In other words, in rejecting the petitioner's alleged and fantastic lien, all that the Circuit Court of Appeals did in the case at bar was to apply, to the rather peculiar facts existing here, and recited in the Opinion of Justice Thompson, Page 52, Record, the well understood Pennsylvania principle relating to dilatory execution plaintiffs. And that principle—we may add—had been applied so recently as 1929 by the Superior Court of Pennsylvania in *Raskin v. Nasow*, 97 Pa. Super. 281.

We might add also that while it is true various States apply different tests, this Pennsylvania test of good faith is not a strange or peculiar one; it is used in some other States, also.

Our adversary cites *Freeman on Executions* in an effort to support his rather obscure position, but that writer, at Page 591, Section 206 of his text book, states that the general proposition is that so long as the writ is not executed in good faith, there is no lien; and in

that Section, Freeman suggests that various States—construing their particular statutes and rules—have held differently on similar sets of facts. And we cannot refrain from suggesting that from the quotation hereinafter set forth, it would seem that the text book writer Freeman is clearly in agreement with the Circuit Court of Appeals; that Court, as we have said, found from the admitted facts that there was a clear showing of legal fraud, which had not been rebutted. From *Freeman on Executions*, Vol. 1, Page 589, Section 206, we quote:

> "An execution, when delivered to an officer, is presumed to have been delivered for service. This presumption may, as we have shown, be rebutted by proving that the delivery was accompanied by directions staying the execution of the writ. In many instances the existence of such directions cannot be established by direct proof, and yet the manner in which the officer has conducted himself, and the lenity with which the plaintiff has viewed such conduct, indicate that the directions must have been given, or that by some means the officer and the plaintiff must have come to a mutual understanding to delay the execution of the writ."

From Page 2 of the Petition in the case at bar, we quote the following concession of petitioner:

> "It is conceded, however, that under the law of Pennsylvania on account of the delay of almost seventeen months, apparently acquiesced in by the petitioner, the execution became dormant, and the lien would have been postponed to other executions subsequently issued while the dormancy continued."

We will take up the several arguments in the Brief filed here by petitioner, as follows:

I.

He says (Page 13 of petitioner's brief):

> "Under the Law of Pennsylvania, the Petitioner's Lien, if the Levy Was Made Solely for the Purpose of Acquiring a Lien and Without a Genuine Intention of Proceeding Promptly With the Collection of His Debt, Was Good as Against the Defendant in the Execution from the Date of the Issuing of the Execution to the Date of the Filing the Petition in Bankruptcy."

That argument, we submit, is wholly without point in this case. Petitioner is here claiming a lien against a fund in the hands of a bankruptcy trustee. The bankruptcy petition and the adjudication in bankruptcy had the effect of an "attachment and injunction" under the clearly defined rules of law: see *Acme v. Beetman*, 222 U. S. 300. The Trustee in Bankruptcy, as to the property which has come into his hands, has the status of a lien creditor; see Section 47 (a) (2) of the bankruptcy statute, printed at Page 16 of this Brief; see *Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642, 36 A. B. R. 754; *Hoyes v. Gibson*, 279 Fed. 812 (C. C. A. Del.); *Bilyu v. Lester*, 281 Fed. 310 (C. C. A. Pa.); *In re Press Printers & Publishers* (C. C. A. N. J. 1927), 23 Fed. (2d) 34.

At Page 16 of his Brief, petitioner cites the late Pennsylvania case of *Geha v. Baltimore Life Insurance Co.*, 168 A. 527, at 528, and quotes one sentence from the Opinion of the Court there. That sentence, divorced from its context, would seem to give some color to petitioner's argument, but an inspection of the Opinion in that case shows that it involves the rights of an execution creditor in a controversy concerning a supersedeas

growing out of an appeal to the Superior Court of Pennsylvania; the question involved in that case has not the faintest resemblance to the question in the case at bar.

2.

His second argument (Page 17 of Petitioner's Brief) is about the same as his first. In the face of the statute and decisions, he insists that the bankrupt estate is not in the position of a lien creditor.

3.

His third argument (Page 18 of his Brief) starts out with what seems to be an admission of a "perversion of the writ," but proceeds to contend that because on August 21, 1930 (nine days before the bankruptcy) he gave the Sheriff new directions to sell, that those new directions enable him to date his lien, not from the day of those new directions—which would do him no good—but from the day of levy, seventeen or eighteen months before.

As we have said, it would do petitioner no good to assert his lien as of that August day (nine days before the bankruptcy) because then admittedly the bankrupt was insolvent (Par. 5 of Petition, Page 3) and the lien would, therefore, be bad under Section 67f of the bankruptcy statute, printed at Page 16 hereof.

This admittedly is a Pennsylvania question, but appellant cites no Pennsylvania appellate case, to support his theory that his August 21, 1930 directions to the Sheriff would enable him to date his lien back to March, 1929. But at Page 18 of his Brief, petitioner does pull two sentences from the Philadelphia Common Pleas case of *Deacon v. Govett,* 4 Phila. 7. Because it is possible

that those two sentences, standing alone, may convey an entirely erroneous impression of what the Court did hold in that case, we print the entire Opinion, as follows (Italics are ours):

> "Sharswood, P. J.—Upon the question of priority between execution-creditors, where the first execution-creditor has instructed the Sheriff not to proceed, or has given no instructions, the cases are legion—a volume might be written to reconcile them. We think, however, that one thing is or ought to be clear, that whatever *laches* an execution-creditor may have been guilty of, if, before any subsequent execution has come to the hands of the Sheriff, he wakes up and orders the Sheriff to proceed, he is safe. *He ought to be be in no worse position, than if he had taken out no execution at all, until he gave the order. Earl's Appeal, 1 Har. 483, is very much like this case, but is wanting in the important element, as we consider, of the absolute order to the Sheriff to proceed before the second execution came to hand. As between the first execution-creditor and the defendant, defendant's selling goods and receiving the proceeds was no payment, and the second execution-creditor had then no lien and had no right to object. When the new order was given, it should be regarded as though an execution were then first levied, and if nobody had then yet got before him, the plaintiff in that execution ought to have the money.*" (The italicised sentences are those which petitioner did not quote.)

We submit that clearly the said Philadelphia Opinion, cited by petitioner, would kill the petitioner's theory here. Following that Opinion, the petitioner here would have a lien as of August 21, 1930, which date, as we have

said—and which petitioner will admit—would be too late by reason of Sec. 67f. Likewise petitioner's citation from *Corpus Juris* (Page 18) to the effect that his new instructions gave him "priority from the time the instructions were given," would also destroy his theory, for the same reason. Therefore, it is probably unnecessary for Your Honors to rule whether the Philadelphia case, aforesaid, or *Corpus Juris*, accurately reflect the Pennsylvania view as to the effect of new directions to a Sheriff; because, if they do, the petitioner is in just as bad position in this case as he would be otherwise.

And, as we have stated, the Circuit Court of Appeals in the case at bar followed the established Pennsylvania principle, which makes good faith the test of validity of writs.

From *Dunham v. Rundle*, 4 Pa. Super. 174, 180 (1897), we quote:

> "The law does not favor an execution for the mere purposes of lien. The ground on which an execution may be postponed to a subsequent levy is that the prior one is not used in good faith for its legal purpose, but in fraud of the rights of the other creditors. The law is thus stated in *Corlies v. Stanbridge*, 5 R. 286: 'If the plaintiff delivers an execution to the Sheriff with direction not to levy at all or not until further orders, it creates no lien upon the defendant's personal property as against a creditor issuing or proceeding with a subsequent execution. The rule is the same if there is a levy accompanied with instructions to stay proceedings. In both cases the plaintiff's object is considered to be to obtain security, not satisfaction for his debt, and the employment of an execution for

this purpose is a perversion of its design and a fraud against third persons:' *Broadhead v. Cornman,* 171 Pa. 322."

A few other States, we will concede, apply different tests for their writs, but how does that concern us? And how are we concerned with the several Federal cases cited by petitioner and each of which construes the statutory or decisional rules as to executions in various States? These Federal cases which at this branch of the case our adversary cites, are outside of Pennsylvania, and in each of them, as we have said, the Court construes the statutes of some particular State; for example, in the *Gulfport Furniture Co.* case, 1 Fed. Supp. 489, cited by our adversary, the Opinion is clearly based upon the particular provisions of the Mississippi code. Another late case which our adversary did not cite but which reached the opposite conclusion from that in the Gulfport case, is *In re Yahya,* (apparently not in Federal Reporter), 18 A. B. R. (N. S.) 490, in which the District Court of Ohio, construing the Ohio code, held that the dilatory execution creditor had lost his lien. We repeat, therefore, that there is no point to the citation of authorities outside Pennsylvania for the purpose attempted by our adversary here.

4.

Petitioner's fourth argument (Page 21) is that bankruptcy does not avoid liens created more than four months prior to bankruptcy.

With that abstract proposition we have no quarrel; but, as we have said, the proposition has no application to the facts of this case. And, in answer to the citations set out at Pages 22 to 24 of his brief, we repeat: the Pennsylvania test is "good faith," and decisions outside Pennsylvania, applying other tests, do not concern us.

5.

The argument that the decision of the Circuit Court of Appeals is contrary to applicable local decisions (Page 24 of Petitioner's Brief) has already been answered by us.

6.

Petitioner argues (Page 25) that the decision here is in conflict with decisions in other Circuits. We repeat, that the question—as petitioner expressly conceded in his printed Brief in the Circuit Court of Appeals—is one to be determined by Pennsylvania law: that under the Pennsylvania law his alleged lien was worthless, as against any subsequent execution and therefore as against the bankrupt estate.

7.

We cannot refrain from adding the following:

The adjudication by the District Court and the Circuit Court of Appeals that the alleged lien of the petitioner herein—tested by the good faith requirement of the Pennsylvania law—was wholly bad, made it unnecessary for those Courts to consider our secondary proposition. That secondary proposition was this: here the trustee in bankruptcy has a fund which is not sufficient to pay in full the admitted and allowed priority claims for wages, and petitioner, by asserting his alleged lien, is endeavoring further to decrease that fund to the extent that his lien would be allowed. His alleged lien is based on his writ of execution issued out of the Pennsylvania court and on that part of Section 64 of the bankruptcy statute which gives priority to debts owing to any person who by the laws of the State is entitled to priority. But, if the District Court and the Circuit

Court of Appeals had held as a matter of law that the lien of petitioner was valid, would they not have then to consider the peculiar position of wage claimants in Pennsylvania, whose rights (in general) *are ahead of those of an execution creditor?* These wage claimants here, under the Pennsylvania law, would probably have been entitled, each, to priority to the limit of $200.00, *ahead of the execution creditor,* who is the petitioner herein, if the proceedings related to a distribution in the State Court. See Pennsylvania Statute of 1891, P. L. 54 (*West's Digest,* Section 21488 *et seq.,* Page 17 of this Brief). True it is that in Pennsylvania the wage claimant must give notice of his claim in writing to the Sheriff "at any time before the actual sale of the property levied upon."—see *West's Digest,* Section 21489, Page 18 of this Brief. In the case at bar, the Sheriff never went to sale and, therefore, the time limit within which these wage claimants could have filed with him priority claims in the execution proceeding, was never reached.

Is it conceivable, we ask, that this petitoner, bringing a lien from the state court to the bankruptcy court and claiming under that lien, would be permitted, in the bankruptcy court to obtain therefrom more money than he would have obtained if he had been allowed to assert and collect on his lien in the state court? And this, to the detriment of labor claimants, who are favorites of the law?

The only answer which the petitioner herein has made to this proposition appears at Page 24 of his Brief. And the attention of the Court is respectfully called to the following: that in that answer—hereinafter quoted—petitioner concedes that under the Pennsylvania law, our wage claimants would have had priority claims to the amount of $200.00 each, ahead of his execution, if

the proceeding had been continued in the state court. His answer to our proposition, at Page 24 of his Brief, is as follows:

> "True it is under Pennsylvania law the wage claimants would have had a priority claim to the amount of $200 each, ahead of the execution creditor if the proceeding had been maintained in the state court. The wage claimants were the parties who removed the proceedings into the bankruptcy courts, they were the petitioners for the involuntary bankruptcy against the debtor. They could have perfected their right in the state court before filing the involuntary petition in bankruptcy by the filing of their claims with the sheriff or receiver. This they did not choose to do and now have no ground for complaint."

It is with regret that we are obliged to suggest that in the part of his argument above quoted, petitioner, instead of printing the original bankruptcy petition as part of his record herein, has found it advisable to step outside of the printed record, and thus to gather facts in a manner that is highly inaccurate, although, no doubt, intended in good faith. Unless our recollection is quite wrong, his foregoing quotation is erroneous in part. There are (R. 22) seventeen priority wage claimants. The bankruptcy statute requires but three creditors to file a bankruptcy petition and three of these wage claimants—and only three—were parties to the creditors' petition in bankruptcy; and those three (represented by undersigned counsel) were petitioners, not in their capacity as priority claimants, but as general creditors having claims above and in addition to the particular priority claims involved in this issue here. And, aside from those inaccuracies in fact may we suggest that if this theory of estoppel as to the seventeen prior-

ity wage claimants aforesaid (represented by the undersigned counsel) now advanced by petitioner, had any legal merit, should he not have asserted it—by proper showing on the printed record—in the earlier stages of this proceeding? And further, we deny that even if the statements of fact in the foregoing quotation were correct, there could be any legal merit to the conclusion which he reaches thereby, and for which he cites no precedent or authority.

We respectfully submit that the decree of the Circuit Court of Appeals for the Third Circuit should be approved.

Respectfully submitted,

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STATUTES.

Section 47 (a) (2) of the Bankruptcy Statute is as follows:

"Sec. 47. Duties of trustees—(a) Trustees shall respectively * * * (2) collect and reduce to money the property of the estate for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied (as amended June 25, 1910)."

Section 67 (f) of the Bankruptcy Statute is as follows:

"Sec. 67. Liens—(f) All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the

benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: PROVIDED, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

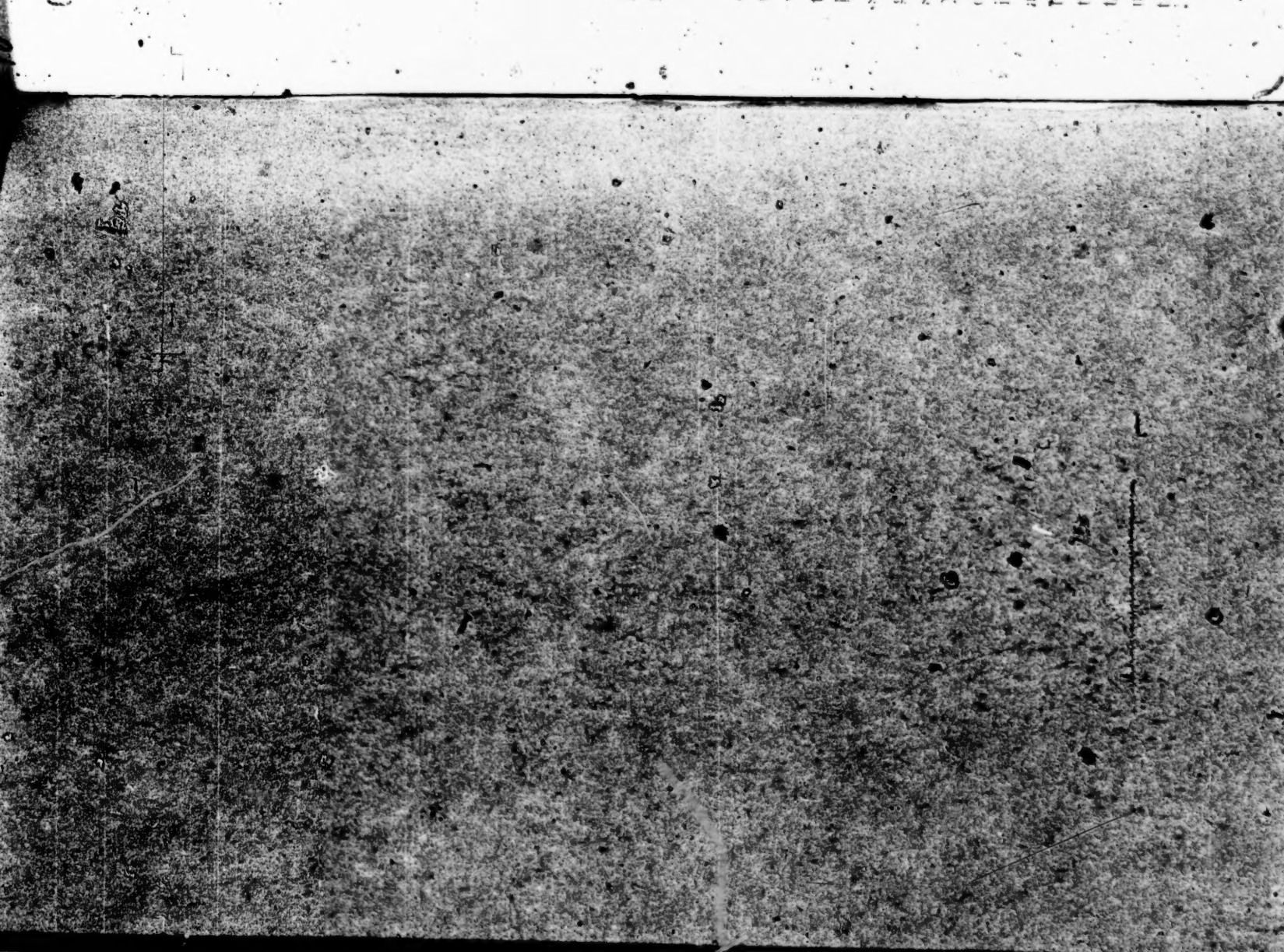
The Pennsylvania Statute of 1891, P. L. 54 (*West Digest, Pa.*, Section 21488, Section 21489) includes the following:

"S. 21488. Claim for wages a lien—All moneys that may be due or hereafter become due for labor and services rendered by any miner or mechanic, servant girl at hotels, boarding houses, restaurants or in private families, or any other servant and helper in and about said houses of entertainment and private families, porter, hostler or any other person employed in and about livery stables or hotels, laundryman or wasner woman, seamster or seamstress employed by merchant tailors or by any other person, milliner, dressmaker, clothier, shirtmaker or clerk employed in stores or elsewhere, hand laborer, including farm laborer or any other kind of laborer, printer, apprentice, and all other tradesmen hired for wages or salary from any person or persons, chartered company, joint-stock company, limited partnership or other partnership, either as owner, lessee, contractor or under-owner whether at so much per diem or otherwise, for any period not exceeding six months preceding the sale or transfer of the real or personal property, works,

mines, manufactories or business or other property connected therewith in carrying on the sale of said person or persons, chartered company, joint-stock company, limited partnership or other partnership, by execution or otherwise, on account of the death or insolvency of such employer or employers, shall be a lien upon said real or personal property, mine, manufactory, business or other property in and about, or used in carrying on said business or in connection therewith, to the extent of the interest of such employer or employers in said property, and shall be preferred and first paid out of the proceeds of the sale of such real and personal property, mine, manufactory, business or other property as aforesaid; Provided however, That the claim thus preferred shall not exceed two hundred dollars; and Provided further, That this act shall not be so construed as to impair contracts existing, or liens of record vested prior to its passage; and Provided further, That no such claim shall be a lien upon any real estate, unless the same be filed in the prothonotary's office of the county in which such real estate is situated, within three months after the same becomes due and owing, in the same manner as mechanics' liens are now filed."

"S. 21489. Claimants to give notice to officers —In all cases of executions, landlord's warrants, attachments and writs of a similar nature hereafter to be issued against any person or persons, or chartered company, engaged as before mentioned, it shall be lawful for such miners, laborers, mechanics or clerks, to give notice in writing of their claim or claims, and the amount thereof, to the officers executing either of such writs, at any time before the actual sale or the property levied on; and such of-

ficers shall pay to such miners, laborers, mechanics and clerks, out of the proceeds of sale, the amount each is justly and legally entitled to receive, not exceeding two hundred dollars."



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SUPREME COURT OF THE UNITED STATES.

No. 669.—October Term, 1933.

John N. Minnich, Petitioner,
vs.
Russell Gardner et al., Intervening Creditors, and D. C. Reiley, Trustee of King Motor Co., Bankrupt.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[April 2, 1934.]

Mr. Justice Sutherland delivered the opinion of the Court.

Petitioner, on March 21, 1929, recovered two judgments in a Pennsylvania state court against the King Motor Company, the larger one being for something over $6,000. March 26 following, execution was issued thereon, and on March 27 the sheriff levied under the execution upon the personal property of the motor company, endorsing his levy upon the writ. On April 15 the sheriff returned "goods on hand not sold." Subsequently, on various dates, a writ, an alias writ, and pluries writs of *venditioni exponas* were issued, upon each of which the sheriff made return to the effect that goods on hand were not sold or writ not executed for want of time. On August 21, 1930, nearly seventeen months after the levy of execution, petitioner directed the sheriff in writing that he must advertise all the goods taken under the original levy and sell them immediately. On the same day the sheriff advertised the goods for sale to be held August 29 following. August 25 a Pennsylvania state court of equity appointed a receiver for the King Motor Company and ordered a stay of the execution until final determination of the matter. August 30 an involuntary petition in bankruptcy was filed against the motor company, upon which an adjudication of bankruptcy was made on September 19. All the personal property of the motor company having been sold by the trustee, it was agreed that $1,776.17, being fifty per cent. of the proceeds of such sale, represented the value of the goods levied upon in behalf of petitioner on March 27, 1929, and included in the trustee's sale. The referee in bankruptcy, after deducting for the

costs which would have been incurred if the goods had been sold by the sheriff, awarded that sum to petitioner.

The referee found, among other things, that petitioner had issued the writ of execution with an intention to collect his money, which he never relinquished or interrupted; that he had no intention to refrain from exacting payment or helping the debtor to hinder other creditors; that the indulgence was good business policy when it is considered that petitioner realized less than one-third of the amount called for by the execution. The referee concluded that petitioner had acted in good faith.

On review the federal district court, sitting in bankruptcy, held that petitioner had no valid lien against the fund and was not entitled to any distribution ahead of certain priority wage claims. The circuit court of appeals affirmed, holding that petitioner had made his levy solely for the purpose of acquiring a lien without a genuine intention of proceeding promptly for the collection of his debt, that he had not met the test of good faith, and, therefore, had failed to establish his lien upon the fund. 66 F. (2d) 561.

Conceding that petitioner intended not to proceed promptly for the collection of his debt, and that his levy was made solely for the purpose of acquiring a lien, we think the conclusion drawn therefrom by the lower court—that he had failed to establish his lien upon the fund—does not follow, since it fails to give effect to the positive order of the petitioner, made nine days before the bankruptcy proceedings were begun, directing the sheriff to proceed at once under the original levy to advertise for sale and sell the goods. The effect of the intention and purpose ascribed to petitioner would be to destroy the priority of the lien obtained by his levy, and thereby expose him to the risk of having his execution postponed in favor of purchasers and subsequent execution creditors. It, nevertheless, would continue good against the judgment debtor and all others not acquiring rights or liens. This, undoubtedly, is the general rule (c. g., *In re Zeis*, 245 Fed. 737, 739; *In re Schwab Printing Company*, 59 F. (2d) 726, 728; *Keel* v. *Larkin*, 72 Ala. 493, 502-503), and is fully recognized by the Pennsylvania decisions. *Kent, Spatz & Co.'s Appeal*, 87 Pa. 165, 167; *McLaughlin* v. *McLaughlin*, 85 Pa. 317, 322; *Meals* v. *Hamman*, 5 Whart. (Pa.) 150, 153; *Fletcher's Appeal*, 17 Leg. Int. (Phila. 1860) 300. In *Eberle* v. *Mayer*, 1 Rawle (Pa.) 366, it was held that an order given

by an execution creditor to stay proceedings on his execution until further directions was a waiver of his priority in favor of a second execution received by the sheriff during the pendency of the stay. By such order, it was said (p. 369), "the plaintiff's execution must be considered as dormant, and constructively fraudulent, as against the subsequent execution."

The general rule is equally well established that in the absence of any intervening rights or liens a direction to the sheriff to proceed with the sale has the effect of reviving the rights obtained by the original levy, that is to say, of reviving not the lien, but the priority of the lien as against all other liens and rights acquired after such direction. *In re Zeis, supra; In re Schwab Printing Company, supra; Miller* v. *Kosch*, 74 Hun. (N. Y.) 50, 52; *Sweetser* v. *Halsey*, 153 Ill. 583, 584. We are of opinion that this general rule obtains in Pennsylvania. It was recognized as applicable to a Pennsylvania judgment as early as 1811 in *Berry* v. *Smith*, 3 Wash. C. C. 60, Fed. Cas. Nos 1359. The judgment considered in that case had been rendered by the Supreme Court of Pennsylvania, and a *fieri facias* had issued with direction to the sheriff not to levy it until further instructions. A few days later the sheriff was directed to proceed with the levy. It was held that a second execution levied in the meantime, if pursued, would take preference, but otherwise if the second execution were issued after the countermand. Mr. Justice Washington, delivering the opinion, said: "The order of suspension deprives the act of the officer, in pursuance of it, of all its force and effect, until it is restored by a countermand; and if, in the mean time, a second execution is taken out and levied, the former must be postponed;—not so, if the second execution issues subsequent to such countermand: and upon this distinction, the decision of the case of *Huber* v. *Schnell*, [1 Browne, 15,] in the common pleas of this state, seems to be entirely correct."

In *Freeburger's Appeal*, 40 Pa. 244, it was held that an execution issued only for the purpose of a lien will be postponed to a subsequent execution issued in good faith. It appeared there that the sheriff had been instructed, when the execution was placed in his hands, not to proceed until further orders, and thereafter to make a levy but not sell. Subsequently the sheriff was told to go on and sell; but the evidence did not make clear that the last order was given prior to the issue of the second execution. The court,

therefore, sustained the lien of the second execution, saying, "All this," referring to the evidence, "leaves it quite uncertain whether the orders to sell under the first execution were prior or subsequent to the issue of the second. But as it is clearly established that the first was used merely as a security until those orders were given, it is incumbent upon Cameron & Billmeyer [first judgment creditors] to prove affirmatively that they were given before the sheriff received the second writ. This they failed to do, and their execution, therefore, has lost its priority." This decision clearly imports the converse of the proposition, namely, that if it had been shown that the orders to sell were given before the receipt of the second execution, the first execution would not have lost its priority. See 2 Freeman on Executions, § 206, p. 1043, n. 138. Our attention has been called to no Pennsylvania decision, and our examination discloses none, which conflicts with that conclusion. In the present case, the proof establishes and the court below concedes that an order to sell, which antedated by nine days the filing of the voluntary petition in bankruptcy, was in fact given.

Since the effect of that order was to revive the priority of the lien, not to create a new one, and since that lien had attached long prior to the beginning of the four months' period preceding the filing of the petition in bankruptcy, it was not affected by the provisions of §67 (f) of the Bankruptcy Act, which declare all liens obtained, etc., within such period null and void. *In re Zeis*, *supra*, 740-741; *In re Schwab Printing Company*, *supra*, 728, and cases cited.

Respondents suggest that, in any event, the case involves the further question whether, as wage claimants, each of them is entitled under a designated Pennsylvania statute to priority to the extent of $200 over the execution creditor. So far as the record discloses that question is raised here for the first time. The report of the referee recites that a preference for the claims, not to exceed $300 to each claimant, was sought under § 64 (b) (5) of the Bankruptcy Act. That subdivision has no relation to claims arising under state law, and no mention of any such claims is made in the referee's report or in the decision of either of the courts below or in the record. In no view of the matter is the question properly before us for consideration.

Decree reversed.